SUPREME COURT, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-716

NATIONAL AUTO BROKERS CORP., FRANK MAIORANA, ANTHONY MAIORANA; RALPH AJELLO, as Administrator of the Estate of E. LOUIS JAMELE, Deceased; NABCOR OF EAST NEW YORK, INC., and ALFRED J. YOUNG, SR. d/b/a A.J. YOUNG, SR. AUTO SALES,

Petitioners,

-against-

GENERAL MOTORS CORPORATION, FREDERIC G. DONNER, JAMES M. ROCHE, BOB BAIN CHEVROLET, PAUL BATT BUICK, INC., GLEN CAMPBELL CHEVROLET, INC., HAMISTER-GILLOGLY CHEVROLET, INC., PARAGON OLDSMOBILE, INC., NIAGARA FRONTIER AUTOMOBILE DEALERS ASSOCIATION, INC., and GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 30, 1978

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The Court of Appeals:	

(i) has decided important questions of federal law which have not been, but should be, settled by this Court (issues I and II below);

(ii) has decided a federal question in a way in conflict with applicable decisions of this Court (issue III below); and

(iii) has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision (issues I and II below).

I. The district judge, biased or not against plaintiffs, should have recused himself under 28 U.S.C. §§ 144 or 455 when, during an extended antitrust trial with GM, GMAC, GI President and GI Chairman as principal defendants, petitioners first learned that the judge and his former law firm represented (and the firm continued to represent) GI, GMAC, GM directors, and a top GI management committee in antitrust and related areas immediately before he became a district judge and was immediately assigned this

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action, without disclosing this relationship (which was known at all times to the GI defendants' attorneys) 49

II. The 2-judge panel, which decided this appeal after the hearing before a 3-judge panel including a disqualified judge known to be such, was itself disqualified by its failure to appoint a successor 3rd judge to rehear argument and participate in the review of the record and rendering of the Court of Appeals' decision 56

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second

Circuit, rendered in this severed action on March 20, 1978.

OPINIONS BELOW

The bench decision of December 6, 1978 by the District Court for the Southern District of New York (Griesa, J.) is unreported except in part at 1976-2 Trade Cas. ¶61,211 and is reproduced in whole in Appendix A (in accompanying volume). The opinion of Circuit Judge Mansfield of the Second Circuit, decided March 20, 1978, is reported at 572 F.2d 953 and is reproduced in Appendix C.

Other opinions rendered by the District Court and not included in the Appendix are:

1. Memorandum and Order dated May 27, 1971 (Frankel, J.);
2. Opinion # 37731 filed June 17, 1971 (Cooper, J.), reported at 332 F. Supp. 280;
3. Opinion # 37956 filed October 20, 1971 (Gurfein, J.), reported at 1971 Trade Cas. ¶73,726;
4. Endorsement and Order filed October 20, 1971 (Ryan, J.), reported at 1971 Trade Cas. ¶73,729;
5. Memorandum # 39269 filed March 5, 1973 (Griesa, J.), reported at 1973-1 Trade Cas. ¶74,405;
6. Opinion # 39745 dated August 3, 1973 (Griesa, J.), reported at 60 F.R.D. 476;
7. Memorandum dated November 23, 1973 (Griesa, J.);
8. Opinion #40560 filed April 5, 1974 (Griesa, J.), reported at 376 F. Supp. 620;
9. Memorandum # 40582 dated April 12, 1974 (Griesa, J.), reported at 1974-1 Trade Cas. ¶75,040;
10. Opinion # 41280 filed October 10, 1974 (Griesa, J.), reported at 1974-2 Trade Cas. ¶75,281;
11. Memorandum, April 11, 1977 (Griesa, J.); and
12. Memorandum Decision # 45084 dated September 14, 1976 (Griesa, J.).

JURISDICTION

The decision of the Court of Appeals for the Second Circuit affirming the judgment of the District Court was made and filed March 20, 1978. See Appendix C, p. 99a. Plaintiffs' petition for a rehearing en banc was denied by two orders each dated and filed August 29, 1978. See Appendices D and E, pp. 122a and 124a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented are:

I. Whether the district judge, biased or not against plaintiffs, should have recused himself under 28 U.S.C. §§ 144 or 455 when, during an extended antitrust trial with GM, GMAC, GM President and GM Chairman as principal defendants, petitioners first learned that the judge and his former law firm represented (and the firm continued to represent) GM, GMAC, GM directors, and a top GM management committee in antitrust and related areas immediately before he became a district judge and was immediately assigned this action, without disclosing this relationship (which was known at all times to the GM defendants' attorneys).

II. Whether the 2-judge panel, which decided this appeal after the hearing before a 3-judge panel including a disqualified judge known to be such, was itself disqualified by its failure to appoint a successor 3rd judge to rehear argument and participate in the review of the record and rendering of the Court of Appeals' decision.

III. Whether the courts below erred when directing (or affirming) a verdict against petitioners and holding there was insufficient evidence to support any jury finding of illegal group boycott ("blacklist") or illegal "whitelist" by any of the 10 defendants as part of an horizontal agreement to fix the retail prices of new cars and prevent competition by "auto brokers".

STATUTORY AND RULES PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part as follows:

> "Every contract, combination or otherwise, or conspiracy, in restraint of trade or commerce among the several States ... is declared to be illegal...."

Section 15 of the Sherman Act, 15 U.S.C. § 15, reads in pertinent part as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court...."

Section 144 of Title 28, U.S.C., entitled "Bias or prejudice of judge", provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Section 455 (unamended) of Title 28, U.S.C., entitled "Interest of justice or judge", provided:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, ... or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Section 455 (amended effective December 5, 1974) of Title 28, U.S.C., entitled "Disqualification of justice, judge, magistrate, or referee in bankruptcy", reads in pertinent part as follows:

> "(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> "(b) He shall also disqualify himself in the following circumstances:

"(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

"(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter....; * * *

"(4) He knows that he, individually ... has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding; * * *

"(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

"(1) 'proceeding' includes pretrial, trial, appellate review, or other stages

of litigation; * * *

"(4) 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser or other active participant in the affairs of a party. * * *"

Section 1254 of Title 28, U.S.C., entitled "Courts of Appeals; certiorari; appeal; certified questions", reads in pertinent part as follows:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree".

Section 1337 of Title 28 U.S.C., entitled "Commerce and anti-trust regulations", reads:

"The district courts shall have original jurisdiction of any civil action

or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Section 0.14 of Part I of the Second Circuit Rules, entitled "Quorum", reads in pertinent part:

"(b) Unless directed otherwise, a panel of the court shall consist of three judges. If a judge of a panel of the court which has heard argument or taken under submission any appeal, petition or motion shall be unable to continue with the consideration of such matter by reason of death, illness, resignation, or incapacity, or shall be relieved of such consideration at his request*, the two remaining judges will determine the matter if they are in agreement and neither requests the designation of a third judge. If they are not in agreement or either requests such a designation, the Chief Judge will designate

* Emphasis supplied.

another circuit judge to sit in place of the judge who has become unable to continue or has been relieved. He shall advise the parties of such designation, but no further argument will be had or briefs received unless otherwise ordered."

Rule 50(a) of the Federal Rules of Civil Procedure, entitled "Motion for a Directed Verdict: When Made; Effect", reads in pertinent part:

"* * * A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury."

Canon 3C(1) of the Code of Judicial Conduct for United States Judges reads in pertinent part:

"A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned..."

Informal Decision 594 of the American Bar Association Ethics Committee, dated October 10, 1962, entitled "Judge Sitting in Case Where Former Firm is Counsel", reads in relevant part:

"With your letter of September 12 you advise that ever since you were elected Associate Justice of the Supreme Court of Arkansas in 1948, it has been your practice not to take part in cases wherein the law firm of which you were a former member appears as counsel, that even though not actually disqualified in such cases, you have felt that the losing lawyer or litigant might not think the Court was wholly unbiased, particularly in a case where the Court was divided and you might cast the deciding vote in favor of your former partner's client. * * * The following Canons of Judicial Ethics might appropriately be referred to:

"'Canon 4. A judge's official conduct should be free from impropriety and the

appearance of impropriety; ....'

"'Canon 13. ... he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.'

"'Canon 26. ... It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.'

* * *

"We give you this background of the Opinions of the Committee so that you will know our approach to these problems.

"There is no Canon of Judicial Ethics which would preclude a judge from sitting

in a case merely because his former firm is counsel in such case. However, the Committee feels that good taste and desire to avoid any seeming impropriety might cause a judge to decline to sit in the following classes of cases where his former firm is counsel:

"(a) Where the case was in the firm at the time he was a member, or

"(b) Where a regular client of the firm at the time he was a member is a party to the case; * * *

"One member of the Committee would omit (b) from our opinion, and expresses the view that there is no more reason for a judge to recuse himself in such a situation than where a personal friend is involved.

"Our Committee also feels that there would be no seeming impropriety or lack of good taste in your sitting in other cases,

particularly after the lapse of several years. Your former firm and its clients, just as in the case of other clients, are entitled to the benefit of your judgment on the court on the cases presented, unless there is disqualification or some consideration of the character indicated above which would cause you to decline to sit. In the final analysis it must be left to the good judgment and conscience of the individual judge."

STATEMENT OF THE CASE

1. Basis for Federal Jurisdiction

The basis for federal jurisdiction in the district court is §§ 1 and 15 of the Sherman Act, 15 U.S.C. §§ 1 and 15, and 28 U.S.C. § 1337.

2. Procedural Background

The original action was filed in the District Court for the Southern District of New York on December 10, 1970. Judge Griesa was appointed to the bench in late 1972 and he was immediately

thereafter assigned this action for all purposes. During 1973, Judge Griesa denied petitioners' motion for a preliminary injunction and later denied petitioners' motions to establish various alleged classes, including one defined to include GM's franchised dealers. Plaintiff National Auto Brokers Corp. ("Nabcor") brought an action in 1974 against 2 Better Business Bureau defendants ("C" suit, now) and another person in the Eastern District of New York, and Judge Griesa requested that the other federal judge transfer the new action to him, which was done. At the request of the parties, Judge Griesa severed the original action into 4 actions, of which this "GM Action" (the "A" action) was tried first. The other 3 actions (B, C & D) against various newspapers as to the 15% discount given ad agencies; various newspapers, Better Business Bureaus, a former BBB official and a bank; and Ford, Chrysler, American Motors and 3 Ford dealers, are still in pretrial, and the ultimate outcome of this petition will

determine whether Judge Griesa is to continue on such cases, as well.

Seven of the 10 defendants in this action, including GM and GMAC, made no summary judgment motion as to the § 1 claim, and Judge Griesa denied the summary judgment motions of defendants Batt Buick, GM Chairman Donner and GM President Roche.

The trial commenced October 6, 1976 with an evidentiary hearing on the preliminary question of admissibility of co-conspirators' statements against the GM Defendants, and after a 7-day evidentiary hearing, Judge Griesa held that the hearsay testimony was inadmissible, saying that plaintiffs did not prove the existence of an illegal conspiracy by a preponderance of the evidence. Immediately thereafter, on October 20, 1976, a 22-day jury trial commenced, ending November 29, 1976, immediately after plaintiffs rested, followed by 4-5 days of argument of defendants' motions for a directed verdict, ending December 6, 1976, with a directed verdict against all 8 plaintiffs and

in favor of all 10 defendants.

Plaintiffs appealed, and the judgment was affirmed by the Second Circuit, and plaintiffs' motion for rehearing was denied by the 2-judge panel and en banc.

3. Statement of Facts

A. Motions for Mistrial and to Recuse District Judge under 28 U.S.C. §§ 144, 455 - Unknown Recent (and His Firm's Continuing) Representation of GM in Related Litigation

On 11/23/76, the 27th day of the 34-day trial, Maiorana learned from his attorney (who was just informed by an associate of Davis Polk & Wardwell) that the firm represents GM, and represented GM when Judge Griesa left the firm as a partner and came as a judge to the Southern District and was assigned this action, prior to 10/72.

Several months earlier, plaintiffs' attorney had learned that Davis Polk had represented GM in a major antitrust suit ending in 1953, 23 years before, but plaintiffs' attorney believed such representation of GM had been moved to Paul, Weiss,

prior to its celebrated Nader investigation in the 1960's and plaintiffs were not even told about this 1953 GM representation by Davis Polk until 11/23/76.

Immediately, during this 27th day of trial, plaintiffs' counsel told Judge Griesa what he had just learned and asked Judge Griesa to declare a mistrial and recuse himself. The oral motion was denied.

Judge Griesa admitted these facts and he worked personally on a GM matter, "unrelated to this litigation" he claimed. GM's attorneys then stated (and Judge Griesa agreed) that Davis Polk represented the Salary and Bonus Committee (top management) of GM or GMAC and referred to a document not delivered to or seen by plaintiffs' counsel, which GM's attorneys said should have been produced by them (but was not, after repeated demands) indicating that Davis Polk were attorneys for the GM Committee. Plaintiffs renewed their recusal motion. From the bench, Judge Griesa denied the renewed motion, saying that none of his GM representation prejudiced

him. Judge Griesa said he remembered that the recusal issue had arisen somewhere, but this was not of record or when plaintiffs or their counsel were present.

Although Judge Griesa stated his firm did some work for GM or GM directors, or entities connected with GM at times, his firm represented GM in 1974 in Automobile Dealer Franchise Act (15 U.S.C. § 1222) litigation, in the Southern District (74 Civ. 2929) when Judge Griesa was denying Nabcor's motion to represent GM's franchisees as a class action against GM.

Two trial days later (on the 29th day of trial), on 11/29/76, Maiorana (who lived in Philadelphia and commuted to New York City for each day of trial) executed and filed an affidavit under 28 U.S.C. § 144 with accompanying certificate describing the above relationship (excluding the 1974 suit) and stating that plaintiffs and counsel were unaware of such GM representation by the judge and his former firm, and that no disclos-

ure was ever made by the judge or defendants' counsel (although they knew); that this action is atypical and could result in a finding that GM's distribution system is illegal; that Judge Griesa repeatedly called Maiorana a liar and this case a "thin tissue of lies"; that plaintiffs' attorney is either incompetent or wilfully misleading the court; that plaintiffs' witness was an embezzler (the judge lacking knowledge of industry practices); that Judge Griesa failed to permit plaintiffs to call GM as a witness in a critical part of the case, relating to fleet and retail allotments and delivery delays (to prove unreasonableness of restraint); that he had vacated numerous discovery requests and prevented plaintiffs from obtaining needed information from GM and other defendants; had failed to take into account the differing economic abilities of plaintiffs and GM; and during the trial he took over questioning and attempted to, or succeeded in, getting witnesses Dillon, Urso and Strimple to change testimony which favored plaintiffs.

Judge Griesa made no statement about the affidavit, other than denying the recusal motion, and he did not state the affidavit was filed belatedly.

Throughout the trial, Judge Griesa displayed an obvious bias against plaintiffs and their counsel, saying: "I am fast coming to the point where I know what the situation is, and we ought to impanel the jury tomorrow"; "...the proof is overwhelming that these allegations by the plaintiffs ... have been rebutted so virtually dramatically by documents, credible evidence, by evidence so far exceeded in credibility than that of the credibility of the plaintiffs' witnesses, it is dramatic. I'm talking about the credibility and believability of the witnesses you put on and ... their testimony ... is simply a tissue of lies"; "Everytime we have gone into depth on any particular episode the testimony of the witnesses by the plaintiffs has been proved to be just absolutely untrustworthy to a remarkable degree." "I have sat

in this court for a little over four years ... and I really have seldom seen witnesses who are so lacking in credibility"; "This man either has a very fertile imagination or he is a very dishonest individual..., ... there is a great opportunity for abuse of the processes of the court unless something is done"; "If I were on the jury it would be devastating to have these explanations come in, devastating to the plaintiffs' case. I guess one piece of strategy for the defense side would be to let Maiorana string himself out, you know, go out on the longest, thinnest, limb they can find, and then simply cut him off. So far they have succeeded in doing that. That's ... what has happened"; "...if this ever happened, and I am not sure it ever happened"; "I don't think you are" "willing to explore everything" (said to plaintiffs' counsel); "We cannot go week after week with the plaintiffs' witnesses testifying with their severe problems of credibility"; "the chances are very great that his story about '67 won't hold up"; "I think it is

virtually tragic to have a long complicated trial over a case that will end up worth ... a few thousand ... It is just really a piece of silliness as far as the court is concerned"; "...the damage claims are so appallingly fictitious..."; "the imposition that you and your attorney are perpetrating on this Court by coming forward with damage claims and other claims which are proving to be more and more fictitious and groundless"; "You have the most aggravated credibility." "I assume there will be a motion to dismiss at the end of plaintiffs' case, right?" MR. KAPLAN: "Yes, sir."; "I heard for weeks about 44 orders placed to Colonial Cadillac, absolute bunk ... Just bunk"; "This litigation is the biggest waste of business I have ever experienced"; "I never read (Nabcor's) ... pretrial memorandum thoroughly. ... I read some of it...."; "Either you don't know the case or else you are intentionally misleading the Court; it is one or the other. I am somewhat inclined to the latter view, and you must stop it"; "The only reason they

had trouble getting the cars was that they were 'embezzling' the deposit money"; "You get these witnesses on the stand and have them tell the truth, or there is going to be a lot more trouble than losing this case"; he read from the perjury section of the Criminal Code and said "...I must state, Mr. Person, that your witnesses have given me the reason for speaking in the terms I have done.... I make no bones about that"; "false testimony and false statements"; "Maybe my memory fails me, but certainly his testimony was another clear-cut example of somebody who was committing some surprising tricks under oath in this court"; "These witnesses absolutely expand and contract as the sun moves through the sky. I never simply have seen such a totally unreliable group of people"; "How much more of a trial does this case require?"; "I don't see any reason to have another three weeks of witnesses about matters where there are no damages that anybody can even talk about. It may be that a motion to dismiss the entire case would

be granted"; "I don't imagine it really happened this way"; "I believe it is quite possible that the plaintiffs will fail in their proof on the basic facts"; "I have not heard a lick of evidence"; "This is an example of the ever shifting claims and contentions of the plaintiffs' side"; "...I assume there will be motions to dismiss?; "...I just have a deep distrust based on experience in this case for that kind of evidence"; "That is a good story if it holds up, but I heard that kind of thing before"; and "... this is a strategy to take care of the inevitable strength of the statistical materials of General Motors".

Also, during pre-trial proceedings, Judge Griesa denied all but 6 of plaintiffs' 74 document production requests; sua sponte vacated plaintiffs' notice of deposition of 29 GI and GMAC officials for depositions of 1/2 day or less, even though defendants had lasted far longer with theirs; vacated all of plaintiffs' 7 sets of interrogatories; twice refused plaintiffs' request to turn

discovery problems over to a magistrate; would not order defendants to identify each oral communication they had about Nabcor even though the judge was aware he had vacated plaintiffs' notice to depose many of the same officials or even as to specified GM-GMAC officials; would not permit plaintiffs to serve interrogatories without clearing them; vacated plaintiffs' interrogatories concerning the then recent firing by GI of all its employees in the New York Zone; denied plaintiffs' motion to enjoin further solicitation by GI's attorneys of Nabcor's franchisees to have them bring civil and criminal proceedings against Nabcor and Maiorana, to use as fabricated evidence in the class-action motion, and to stop GM-GMAC from participating in any other armed robbery of Nabcor's records, which Judge Griesa denied without reading; refused to allow plaintitffs to take oral depositions on written questions under Rule 31, F.R.Civ.P., knowing of plaintiffs' poor financial condition; denied all discovery on plaintiffs' §2, Sherman Act claims;

refused to order GI to produce policy documents concerning GI's warranty program and destination charges; quashed each of plaintiffs' trial subpoenaes; asked to speak with GI's 4 attorneys before trial in absence of plaintiffs' counsel; sua sponte requested a federal judge in an adjoining district to transfer to Judge Griesa an action filed by Nabcor in 1974 against 2 of EBB defendants and another; and put plaintiffs through financial burdens of 2 trials (including the evidentiary hearing) and refused to salvage this double trial by submitting the case to the jury (but permitted 4-5 days of argument on the directed-verdict motions.

Pretrial with Judge Griesa resulted in plaintiffs' obtaining no evidence from GI-GMAC to prove plaintiffs' claims in the warranty, mandatory destination-charge and other parts of the action (and being unable to get valuable evidence as to the matters actually tried).

B. Argument before Second Circuit Panel Including Disqualified Circuit Judge; Decision by 2-Judge Panel

Argument on the appeal in the Second Circuit was held December 6, 1977, before Circuit Judges Mansfield, Smith and Moore, as a "hot court". Three months later, several days before the March 20, 1978 opinion was released by Circuit Judges Mansfield and Moore, plaintiffs' attorney was advised by the 2-judge panel that Judge Smith had disqualified himself; plaintiffs' attorney requested that a successor 3rd judge be appointed; and Judge Mansfield's clerk told plaintiffs' attorney that he did now know the reason for Judge Smith's disqualification. Judge Smith's office reported the following week (to an inquiring reporter) that his disqualification was "a question of stock ownership", a clear reference to ownership of GM stock. Plaintiffs' motion for reargument and request for a new panel was denied, after 6 months. Appendix G is a copy of an unanswered letter from plaintiffs' attorney to Circuit Judges Mansfield,

and Smith and Chief Judge Kaufman requesting information about the disqualification.

Previously, on April 29, 1977, Judge Smith had written an opinion in Person v. The Association of the Bar of the City of New York, et al., 554 F.2d 534 (2nd Cir. 1977), cert. denied, ___ U.S. ___ (1977), overruling District Judge Dooling's decision and judgment declaring unconstitutional the ABA Disciplinary Rule 7-109(c) prohibiting use of expert witnesses on a contingent-fee basis. Plaintiffs' counsel herein had sued to be able to use such expert witnesses in this Nabcor Action. Thus, Judge Smith was aware of the parties to this action when he heard the argument only 7 months later. The stock ownership question arose either before or after the Nabcor argument herein. If after, it would appear that there was a wilful disqualification; if before, he knew he was disqualified at the time of argument.

Section 0.14(b) of the Second Circuit Rules does not permit a 2-judge panel in the event of either of these two possibilities.

C. Directed Verdict - Judge Griesa's Opinion

The evidence proves that Nabcor was effectively destroyed by early 1967, through the conspiratorial acts (i) preventing plaintiffs from filling specific car orders by refusals of GM dealers to deliver ordered cars; (ii) and loss of specific car orders by customer cancellations caused by inordinate and unexplained delivery delays or by reorders after Nabcor's accepted orders were turned back. Nabcor was made financially unable to provide contractual services to its franchisees, causing a loss of Nabcor's franchisees. After early 1967, Nabcor's car orders became insignificant (about 1 per week). Judge Griesa concentrated on this post-destruction era when Nabcor had far fewer delivery difficulties.

Judge Griesa's opinion is wholly erroneous in its discussion of the admitted evidence, as follows (appendix page numbers indicate the erroneous discussion:

(5a) Judge Griesa obviously did weigh the

credibility of plaintiffs' witnesses (see 22-26, supra) to reach his "one reasonable conclusion". (7a) General's request to buy 200 cars from a Buffalo Chevrolet dealer was stopped by the GM Zone manager who said GM would not supply the cars; Nabcor's 44-45 orders at Colonial Cadillac were not delivered because GM refused to give Nabcor the fleet certificate requested by Colonial during 1966; dealers testified they needed fleet allotments to sell to Nabcor and Nabcor's admitted disqualification resulted in refusals by dealers to fill Nabcor's orders (Ruckle, Colonial and others). This is the "whitelist" theory: that GM dealers were artificially limited in the number of retail cars they could buy and were thereby forced into asking permission of the GM Fleet Section to sell cars on a quantity basis to any purchasers; GM refused to issue the "fleet certificate" or grant a "fleet allotment" to companies such as Nabcor not approved by GM as "fleet purchasers".

(17a) "certain inherent problems" is wrong:

Nabcor could always find new dealers willing to order cars for Nabcor, but most subsequently refused to deliver, or accept new orders; GM Zone officials told Nabcor they would see that Nabcor got no cars (Gray, Speece, English); some dealers were always willing to sell to Nabcor for the small markup involved; if they didn't others would and did; only GM could stop GM dealers from selling to Nabcor.

Plaintiffs' "blacklist" argument is based on instances where defendant dealers told Nabcor or General that GM officials had told them not to sell any cars to Nabcor or General, whether at fleet or retail prices. (17a) GM dealers were willing to sell even 1 car to Nabcor on a "fleet" basis, hoping to sell more. (18a) Nabcor's customers could look at specific cars in GM dealers' showrooms.

Nabcor's system generated less business than contemplated (19a), the result of the alleged conspiracy, which interfered with Nabcor's orders; made Nabcor's business unprofitable; interfered with Nabcor's contractual relationships with its

brokers; this made Nabcor unable to give its brokers the advertising, legal backup, marketing programs, training, motivation, supervision promised. (20a) crippling of Nabcor crippled Nabcor's brokers, who were dependent for support services and on-time delivery of ordered cars. (21a) the 3rd activity is the inordinate delivery delays, causing customer cancellation, if the GM dealer had not already refused to deliver. (21a) General was prevented in 1967 from setting up even 1 source of supply in Buffalo by a 100% boycott by GM dealers and dealer association, causing General to go broke; later, in 1968, when General had no assets and only 1 franchisee to service (plaintiff Young) General could get the small number of cars it wanted in Buffalo, but only by pretending to order for GM fleet-certificate holder Econo-car, with the knowledge and connivance of defendant dealers.

(22a) Nabcor obtained 160 orders during 9/12/66 and delivered only 70 cars. Ninety orders

were lost, resulting from delivery refusals (including 38 Cadillac orders) and customer cancellations caused by inordinate delivery delays; plaintiffs specified about 100 transactions interfered with, mostly in the period ending in early 1967. (23a) Paragon refused to deliver in late 1966 the few cars ordered by Nabcor and told Nabcor in 1966-67 that Paragon could not sell then to Nabcor because the GM Zone was shutting Nabcor off all over the place because Nabcor has no fleet certificate.

(24a) Nabcor's log lists 44 orders to Colonial Cadillac ending early 1967, which was read to the jury; Maiorana testified he placed the orders, and Colonial testified they threw away unfilled orders after 2-3 months; Colonial even offered to fill some of these orders with 2 cars in inventory; the Justice Department request for documents came after Colonial's disposal of the Nabcor orders.

(24a) GM did not use its own records of its dealings with GM dealers in compiling the statistics, contrary to the court's direction.

(25a) High GM officials were aware that Nabcor was having difficulty because of dealer refusals to order or deliver, delivery delays, and GM dealers' unwillingness to sell to Nabcor unless it had a fleet certificate; and that GM was telling dealers not to sell to Nabcor. GM "corporate" response was that it had no control over the GM Fleet Section, which had the sole authority over the fleet certificate, as to each of the 5 motor-car divisions. Chairman Donner testified he never head of the GM "fleet allotments". Thus, the "corporate officials" were the GM Fleet Section heads, each of whom testified and was responsible for publication of the National Account List of GM fleet certificate holders, as a "whitelist" of GM-approved fleet customers for GM dealers; otherwise, the GM dealers were limited to their artificially-limited "retail allotment", an unreasonable and manipulative scheme designed to keep retail prices high as to customers not approved by GM for fleet purchases.

(25a) because Nabcor had no fleet certificate (i) one GM dealer refused to make a 200-car commitment to General, GM having refused to supply the cars to the dealer; a Nabcor car being delivered to Kline Pontiac was diverted by Pontiac; inordinate delivery delays existed with 50% of Nabcor's orders, and 83% of the inordinate delays were for more than 63 days at Rohrer, which testified it never delayed sending in the Nabcor order or delivering the car to Nabcor; one Nabcor car was taken by GM off the Buick dealer's floor, the only time in 20 years.

(25a) The GM President and Board Chairman were advised by Nabcor that the Buffalo Zone was telling dealers not to sell to Nabcor and General, but the Nabcor problem was referred to the Fleet Section, which did nothing, even though it had documents explaining what was happeding; the Fleet Section asked Nabcor for information it already had from the Zone and which Maiorana already gave, as an apparent reason for failing

to act upon Nabcor's repeated complaints. GM wanted a list of Nabcor's GM dealers, which Nabcor refused.

(26a) The GM motorcar divisions are tied together by the Fleet Section; a concurrence of refusals in various New York GM zones during late 1966 with refusals by Midtown Chevrolet, Ruckle Pontiac, Luby Chevrolet and various others.

(28a) Judge Griesa concentrates on the last 3-1/2 years when Nabcor was effectively out of business; and refuses to consider the delays as part of Nabcor's refusal problem; (29a) Many times Nabcor had to reorder cars refused delivery, and in some cases the subsequent orders were also refused delivery or delayed, or customer-cancelled for lateness. (32a) deals with the last 3-1/2 years of period when Nabcor averaged 1 car order per week from all 148 brokers; even then, Nabcor still suffered cancellations from delays and a small number of refusals to deliver.

(37a) By 1967-8, Nabcor learned it could not

obtain Cadillacs and stopped encouraging brokers to submit Cadillac orders; even then Nabcor only got about 55-60% of the Cadillacs ordered, with substantial title-hiding problems by dealers who did not want the GM Zone to see to whom the Cadillacs were being sold.

(38a) In 1967, General could not obtain any GM sources in Buffalo and ran out of capital by early 1968, when he was first able to order a limited number of cars; in 1967, General had the capital to turn over at least 200 cars per year.

(40a) Judge Griesa assumes that for destruction of a business Nabcor must not be able to get any cars, and that substantial interference through delivery refusals and a substantial number of substantial delivery delays, resulting in broker and customer dissatisfaction and customer cancellation are not actionable. A jury would reasonably find otherwise. Nabcor's management devoted much time looking for new sources of cars and pacifying customers and Nabcor brokers

because of the repeated losses of its sources and reordering of previously ordered cars; a substantial drain on any thinly capitalized business. Nabcor's initial capitalization was $35,000.

(41a) Evidence was admitted that GM officials told Nabcor that Nabcor would not be able to get any GM cars, and this became true as to some dealers, particularly through the outright refusals, refusals to deliver specific cars; and unexplained, substantial delivery delays (resulting in customer cancellations prior to dealer refusals to deliver).

(46a) Midtown told Nabcor that it was refusing to honor the Don Allen contract with Nabcor because Midtown's function was to keep retail prices high, even at a loss, so that customers would be forced into buying their cars at retail from GM's outlying dealers, including ones which refused to deal with Nabcor. This was price-fixing, unquestionably. Nabcor lost some of its customers because of the Midtown delays, and had to reorder the cars for

the customers which had not yet cancelled from another GM dealer, with inevitable delivery delays and cancellations by other customers; this occurred while Gray of Pontiac Zone said Nabcor would get no Pontiacs because it had no fleet certificate; and Ruckle refusing to deliver the ordered Pontiacs shortly after the Pontiac official met with Ruckle; and Ruckle himself was giving up his own auto brokerage business; Ruckle had previously offered Maiorana $500,000 for 2/3's of Nabcor. (47a) GM-Midtown had no right to prevent performance of timely deliveries under Nabcor's order contract with Midtown's predecessor; Midtown-GM assumed the obligations under law.

(50a) A.C. Chevrolet shows A.C. wanted to deal with Nabcor, but could not get the cars from GM and delivered demonstrators, instead.

(50a-51a) Shows maximum of 14 customer cancellations due to late deliveries by Chevrolet dealers.

(52a-53a) the Ruckle orders returned were

marked as retail orders; previously Ruckle changed its ordering method from "fleet" to "retail" around the time of the visit to Ruckle by the high GM (Pontiac) official, who was derogatory about Nabcor; (54a) Nabcor lost some of the Ruckle orders through customer cancellation for delays, including the reordering delays.

(57a) Rosenstock was not a defendant, and his reason for refusing to deliver, as told to Nabcor, was not admitted.

(67a-68a) The fleet certificate is GM's means of selling directly to persons and bypassing GM's own dealers, and preventing GM dealers from selling to persons not approved by GM, to fix retail prices and force boycotts of auto brokers such as Nabcor; also, this permits GM to charge lower prices to certain GM customers (with such sales made on a token "fleet" basis through one of GM's thousands of GM dealers, in what amounts to a customer allocation scheme in aid of the scheme to fix retail prices at higher levels.

The relationship between fleet certificates and fleet allotments was clear from the evidence.

(69a) After Gray referred to Nabcor as "bootlegger", Ruckle refused to deliver the orders.

(70a-71a) Fleet certificates were the successor to the old "fleet agreement", under which GM-approved fleet purchasers agreed with GM not to resell the cars, and that the fleet certificate was often referred to by the GM Fleet Section as a "fleet agreement", an error resulting from the similarity in purpose between the two, that purchasers on a "fleet basis" were prohibited by GM from reselling them at retail; a restriction designed to hinder Nabcor-type companies, and in violation of the court's injunction in United States v. General Motors, 384 U.S. 127 (1966), which prohibited GM from interfering with discount sales of Chevrolets by discount houses and others anywhere in the United States.

(72a) Sales of cars after Gray and McNamara incidents were only the delivery of cars already

ordered by Nabcor; the Ruckle refusals to deliver occurred 3 days after the McNamara visit to Ruckle.

(78a) Also, the visit was prompted by a zone memorandum that the Chevrolet dealers in Philadelphia should be alerted that Nabcor has no fleet certificate, and therefore should not be sold cars.

(78a) Nabcor was having extended delivery delays at Rohrer, caused by GM's interference with Rohrers' "fleet" orders for Nabcor, changing them to "retail" orders.

(79a-80a) The GMAC manager had not approved the financing application; he had recommended approval to higher ups, who refused to approve the application and asked for Nabcor to guarantee GM's loan to the dealer, which was to be fully-secured by the GM dealer and collateralized by the subject cars.

(82a) Various GM officials told Nabcor that it would not be able to get cars from GM dealers for resale; and that Nabcor should not be reselling cars, and Roche so testified.

(84a) the delay problem was not a "fallback" problem; it was an integral part of the continuum of (i) outright refusal; (ii) acceptance of Nabcor orders and refusal to deliver all or some of the ordered cars, followed by an outright refusal to deal any further; (iii) extended delays on delivery of ordered cars resulting in non-delivery through Nabcor customer cancellation; and (iv) loss of Nabcor's broker and Nabcor's goodwill because of this interference with Nabcor's business.

(84a) Delays by GM dealers should average 28 to 30 days; Nabcor's manual said 4 to 6 weeks (or 28 to 42 days), but this was written when Nabcor had already experienced substantial delays and was litting Nabcor's brokers know how long <u>in fact</u> it was then taking for Nabcor to get cars, from the 4 different manufacturers, on the average, presumably.

(85a) Nabcor's evidence was that 50% of its car orders were delivered after 40 or more days,

even though the average delivery time was only 28 to 30 days. The Nabcor delays were the rule.

(87a) Nabcor's financial statements showed $12,000 in cash on 1/31/67; a deficit of $143,765; gross profits of $9,000 on its 160 orders for fiscal 1967, ending 1/31/67; and Nabcor fired in 12/66-1/67 all but 3 of its 50-60 employees because of the interference with Nabcor's business. Without increases in car sales, Nabcor could not survive (except temporarily on its franchise income); these increases never came, because of the interferences; Nabcor lost hundreds of specific orders during the whole period and its growth was stifled.

(88a) Plaintiffs testified about how Nabcor's critical financial condition affected Nabcor's brokers adversely, preventing them from obtaining needed support services promised to them by Nabcor.

(91a) Individual plaintiffs testified about their loss of value in Nabcor stock due to Nabcor's destruction.

REASONS FOR GRANTING THE WRIT

Petitioners submit that this Court should grant this petition for the following reasons:

(i) The Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court (issues I and II below).

(ii) The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court (issue III below).

(iii) The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision (issues I and II below).

I.

The district judge, biased or not against plaintiffs, should have recused himself under 28 U.S.C. §§ 144 or 455 when, during an extended antitrust trial with GM, GMAC, GM President and GM Chairman as principal defendants, petitioners first learned that the judge and his former law firm represented (and the firm continued to represent) GM, GMAC, GM directors, and a top GM management committee in antitrust and related areas immediately before he became a district judge and was immediately assigned this action, without disclosing this relationship (which was known at all times to the GM defendants' attorneys).

II.

The 2-judge panel, which decided this appeal after the hearing before a 3-judge panel including a disqualified judge known to be such, was itself disqualified by its failure to appoint a successor 3rd judge to rehear argument and participate in

the review of the record and rendering of the Court of Appeals' decision.

III.

The courts below erred when directing (or affirming) a verdict against petitioners and holding there was insufficient evidence to support any jury finding of illegal group boycott ("blacklist") or illegal "whitelist" by any of the 10 defendants as part of an horizontal agreement to fix the retail prices of new cars and prevent competition by "auto brokers".

I. - Discussion

Judge Griesa should have disqualified himself under 28 U.S.C. § 144. The affidavit was sufficient, alleging specific facts for anyone reasonably to conclude that the judge was biased against plaintiffs for the extra-judicial reason of prior representation of GM, GMAC and top management thereof by Judge Griesa and his firm, and his

firm's continuing representation. The representation was in the antitrust, dealer litigation and GM top management areas, where Judge Griesa's decisions in the Nabcor Action could substantially and adversely affect GM and his former firm; Judge Griesa's decisions in the Nabcor antitrust action could be in conflict with advice rendered to GM by the firm during Judge Griesa's presence as partner (creating possible malpractice liability for the firm members and Judge Griesa himself); and the information which came to the firm's attention to render its advice could have prejudiced Judge Griesa. This information is imputed to Judge Griesa, see SCA Services, Inc. v. Morgan, 557 F.2d 110, 114 (7th Cir. 1977). In fact, his firm was named on a document which GM's attorneys failed to produce to plaintiffs (for the apparent purpose of hiding the relationship between Judge Griesa's firm and GM from plaintiffs' counsel). It is difficult to see how anyone advising and defending GM in antitrust

matters could not obtain material information relevant to an antitrust suit brought against GM attacking its franchised system and distribution methods. Defendant (GM President) Roche had already testified that GM's business was delicately balanced, and that tampering with any of its parts (by Nabcor's competition with GM's dealers) would seriously affect these other parts of GM (including salaries and bonuses for top management, GM's relationships with its dealers).

Thus, Davis Polk and Judge Griesa had knowledge about various parts of GM, a knowledge of facts relevant and possibly relevant to (i) the Nabcor §§ 1-2, Sherman Act action, (ii) Nabcor's class-action motion to represent the GM dealers, (iii) Nabcor's effect on GM's business, and other relevant matters. Representation of a defendant in an antitrust suit should bar the lawyer from representing an antitrust plaintiff against the same defendant or from acting as a judge in a case against the defendant and

former client. Also, Judge Griesa's and Messrs. Paul, Weiss' failure to advise plaintiffs about this representation of GM gave plaintiffs ample justification for requesting Judge Griesa's recusal under 28 U.S.C. §§ 144, 455 - under the appearance of impropriety test. See Canon 3C(1) of the Code of Judicial Conduct for United States Judges.

Also, Judge Griesa's recent departure as partner from the Davis Polk firm gave rise to the reasonable belief that he had a continuing interest in the firm when he was first assigned the Nabcor action and, therefore, (i) the firm's continued representation of GM and (ii) avoidance of rendering any antitrust decisions which would make his form's advice malpractice or suspect.

The § 144 affidavit and certificate were filed on a timely basis, on the 2nd day in court (6 actual days) following the oral motion to recuse, and Judge Griesa did not state the affidavit was filed belatedly.

Prior to commencement of trial a 5-day delay was not untimely. United States v. Townsend, 478 F.2d 1072 (3rd Cir. 1973). The 6-day (i.e., 2-trial-day) delay was with reasonable diligence, considering the difficulties of an individual practitioner in a major antitrust suit at trial, having to remain in the courtroom during the whole day and prepare for succeeding trial days; with his principal client in New York City only for each trial day; the necessity to research the law and draft the needed documents, including a look at parts of the massive record; and the fact that the issue was raised orally in court immediately after the facts became known make the filing of the affidavit of bias in 2 trial days a filing with reasonable diligence. Bradley v. School Board of City of Richmond, 324 F.Supp. 439 (D. Va. 1971); Hall v. Burkett, 391 F.Supp. 237 (W.D. Okl. 1975).

No plaintiff was aware of GM's representation by Judge Griesa or his former law firm until

minutes before the oral mistrial and recusal motion was made, and plaintiffs' attorney was also unaware, except he knew (without mentioning such fact to his clients) that Judge Griesa's former firm had represented GM for an unknown period ending 23 years earlier, a fact clearly insufficient to obtain a recusal. Also, it was unknown that Judge Griesa had been a partner in Davis Polk when it represented GM. Plaintiffs' counsel reasonably believed that the GM representation was taken over by the Paul, Weiss firm in the 1960's or earlier, no later than Paul, Weiss' representation of GM in the celebrated Nader investigation and public apology by firm partner Schlesinger.

In light of the foregoing, under old § 455, Title 28 U.S.C., Judge Griesa had a "substantial interest" (possible malpractice liability; continuing interest); and he was "so related to or connected with any party or his attorney as to render it improper, in his opinion"

(subject to abuse of discretion test) "for him to sit on the trial" (possible malpractice liability; knowledge of disputed facts; continuing interest in the firm's profits, or appearance thereof to plaintiffs).

Under amended § 455, effective prior to commencement of the trial and before severance of the GM Action, Judge Griesa should have disqualified him under (a), where his impartiality might reasonably be questioned, United States v. Ritter, 540 F.2d 459 (10th Cir., 1976), cert. denied, 429 U.S. 951; (b)(1) a personal bias or prejudice for extrinsic reasons and knowledge of disputed facts; (b)(2) his law firm represented GM in related antitrust matters; (b)(4) financial or other interest (malpractice liability, continuing interest in partnership profits).

II. - Discussion

As a so-called "hot court", each of the judges has read the briefs and possibly parts of the record before hearing the argument. Whether a "hot court" or not, the argument itself is of fundamental importance to all of the parties. If a judge has any questions about the case he can obtain immediate answers from the appellants' or appellees' attorneys in an adversary setting, and can make his decision based on this and other information. Also, inquiries from a single judge can help the other members of the 3-judge panel come to a proper decision. It is assumed that the panel has not already decided a case before the hearing takes place.

However, if a judge is disqualified to serve as a judge on the 3-judge appellate panel for any reason at the time of argument, the 3-judge panel ceases to be able to function in the intended way; the value of having 3 non-disqualified judges is lost; and the parties are denied due process.

Judge Smith removed himself, 3 months after having heard oral argument, because of a reported question of stock ownership, presumably GM stock (the only other public company not a subsidiary of GM was appellant Mabcor).

As a consequence of his sitting in on the argument while he was (apparently) disqualified for some reason, appellants were deprived of a qualified judge. If the panel had included a third (qualified) judge, this could well have resulted in a change in outcome of the case (even if the 3rd judge merely listened to the tapes of the appellate argument, but to a lesser extent). For example, the third (qualified) judge could have had a greater interest in the case or perhaps a better insight to the issues. Also, he could have affected the ultimate outcome in the 3-judge panel, in the requested en banc proceeding or in this Court, by the filing or threat of filing of a dissenting opinion; also, disqualification only days before the decision came down indicates

the possibility that he disqualified himself after a decision had already been reached, creating an appearance of impropriety necessarily disqualifying the whole panel under 28 U.S.C. § 455.

Accordingly, the value of the 3-judge panel was lost to the appellants; the hearing was not according to due process; and the matter should be transferred back to a new 3-judge panel for reargument. Under § 0.14(b) of the Second Circuit Rules it would appear that appellants were entitled to such a new panel:

> "(b) Unless directed otherwise, a panel of the court shall consist of three judges."

The quoted sentence above read in conjunction with the underscored part of the Rule at p. 10 supra clearly mean that a panel should consist of 3 judges none of whom at the time of argument or at the making of the decision is disqualified. The rule was obviously intended to cover only a non-wilful disqualification subsequent to the argument.

III. - Discussion

Reasonable persons not only could reach a different conclusion from the admitted evidence, but few reasonable persons would have decided the case against plaintiffs. Judge Griesa and the Second Circuit erred in their application of Epoch Producing Corp. v. Killian Shows, Inc., 522 F.2d 737, 742-43 (2nd Cir. 1975), cert. denied, 424 U.S. 955 (1976). Also, see Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

Also, Judge Griesa's bias and refusal to recuse himself must be taken into consideration when looking at plaintiffs' evidence; a judge not disqualified would have permitted plaintiffs use of the discovery rules to provide far more evidence, and would have decided the directed-verdict motions in favor of plaintiffs.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Carl E. Person
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New York, N.Y. 10038

October 30, 1978

FILED
OCT 30 1978
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-716

NATIONAL AUTO BROKERS CORP., FRANK MAIORANA, ANTHONY MAIORANA, GENERAL AUTO SALES & LEASING, INC., DALE STRIMPLE; RALPH AJELLO, as Administrator of the Estate of E. LOUIS JAMELE, Deceased; NABCOR OF EAST NEW YORK, INC., and ALFRED J. YOUNG, SR. d/b/a A.J. YOUNG, SR. AUTO SALES,

Petitioners,

-against-

GENERAL MOTORS CORPORATION, FREDERIC G. DONNER, JAMES M. ROCHE, BOB BAIN CHEVROLET, PAUL BATT BUICK, INC., GLEN CAMPBELL CHEVROLET, INC., HAMISTER-GILLOGLY CHEVROLET, INC., PARAGON OLDSMOBILE, INC., NIAGARA FRONTIER AUTOMOBILE DEALERS ASSOCIATION, INC., and GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents,

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New York, N.Y. 10038

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October 30, 1978

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APPENDIX A - BENCH DECISION OF DECEMBER 6, 1976 OF DISTRICT COURT, SOUTHERN DIST. N.Y. (GRIESA, J)

NATIONAL AUTO BROKERS CORP., et al.

vs. 70 Civ 5421A

GENERAL MOTORS CORPORATION, et al.

December 6, 1976
9:15 a.m.

Trial resumed.

* * *

/Bench Decision/

As I said, I will proceed now to put my statement on the record, and in a more formal manner.

As the record shows, all the defendants have moved at the conclusion of the plaintiffs' case to dismiss all of the remaining counts and claims of the plaintiffs against the defendants.

Certain motions were granted by me during the course of our discussion, and I believe that the motions that are still left for decision are as follows:

There is a motion to dismiss the central

claim in the case, that is, Count 1 of the complaint under Section 1 of the Sherman Act. The remaining parties to Count 1 are Nabcor, General Auto Sales & Leasing, Nabcor of East New York, Frank Maiorana and Anthony Maiorana (the principals of Nabcor), and Dale Strimple (a principal of General), as the plaintiffs.

The remaining defendants to Count 1 are General Motors, General Motors Acceptance Corporation, Paul Batt Buick Company, Campbell Chevrolet, Bob Bain Chevrolet, Gillogly Chevrolet and the Niagara Frontier Automobile Dealers Association, formerly known as Buffalo Automobile Dealers Association.

There is also still in the action Count 3, which basically involves a charge that Section 1 of the Sherman Act was violated in the District of Columbia. This is a special statute which provides for liability in the District of Columbia

and Count 3 alleges a violation of that statute.

Then there is a small part of Count 17 to be dealt with, which I will come to later.

As you know, Count 1 charges violation of Section 1 of the Sherman Act and alleges basically that there was a combination or conspiracy among General Motors, General Motors Acceptance Corporation and certain General Motors franchised dealers designed to prevent Nabcor and its affiliates from obtaining automobiles. This is a so-called Black List theory which has been referred to as such by the plaintiffs' attorney.

The description or the allegations in the complaint are very lengthy, but I might mention a few of them. There is the allegation that General Motors and the other alleged co-conspirators, including General Motors dealers, conspired so that General Motors coerced and convinced franchised dealers or certain franchised dealers not to continue supplying new automobiles to Nabcor.

It is alleged that General Motors conspired with certain dealers to assist in eliminating Nabcor and its franchisees as competitors. It is alleged that General Motors conspired to coerce and convince the dealers who were dealing with Nabcor to discontinue their dealing under threats of loss of franchise and so forth.

Now, there is another allegation which Mr. Person on behalf of the plaintiffs has referred to as the so-called White List theory. Nabcor alleges that it wished to purchase cars in quantity on what Nabcor called a fleet basis.

It is alleged that General Motors under certain circumstances made fleet allotments available to its dealers to provide quantities of cars for those dealers to sell to certain fleet customers.

Nabcor alleges that this type of allotment was not available for dealers in order to

provide them with cars to sell to Nabcor, thus preventing Nabcor from obtaining cars which it should have been able to obtain.

The standard which I am to apply in dealing with these motions to dismiss are as follows. I refer to a case, Epic Producing Corporation v. Killiam Shows, Inc., 522 Fed. 2nd at 737. This is a case decided by the Second Circuit Court of Appeals, which has held that in order to grant a motion to dismiss, the evidence must be such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict.

If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, then the granting of the motion is proper.

On the other hand, if there is substantial evidence opposed to the motion, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the case should be submitted to the jury and the motion to dismiss or for a direct verdict should not be granted.

There has to be something beyond a mere tid-bit or scintilla of evidence in order to get the case to the jury. That is the standard which I am seeking to apply. I am ruling that under this standard all remaining claims must be dismissed.

After an exhaustive review of the evidence, I have concluded that there is no evidence upon which the jury could reasonably decide that there was a conspiracy or combination of General Motors with its dealers or any of them to boycott or to deprive Nabcor of automobiles. In other words, there is no evidence upon which the jury could

reasonably conclude in favor or uphold the so-called Black List theory.

Let me go on to the so-called White List theory. I have concluded that as a matter of law General Motors has the right to make fleet allotments available to dealers for potential sales to fleet customers other than Nabcor and has the right not to make such allotments available for potential sales to Nabcor. However, I am holding further that there is no evidence whatever that any specific orders of Nabcor were ever denied because of any fleet allotment problems.

I have concluded that the legal question about the right of General Motors to make fleet allotments in the way it did, and when I say the way it did, I am assuming the situation most favorable to plaintiffs here, I am only saying that that question is academic as far as this case is concerned, because there is absolutely no evidence

that Nabcor failed to obtain any cars in any specific transactions because of problems of allotment.

In other words, there was a lot of discussion about the fleet allotment, fleet certificates in a very theoretical manner, but when it came to evidence about the allotment problem which prevented Nabcor from getting any cars, I don't find any such evidence at all.

I would like to mention briefly the matter of the time period covered by the action. The complaint was filed and an action commenced December 10, 1970. There is a four-year statute of limitations which means that the time period covered by any claims could go back to December 10, 1966, but no further.

There was no supplementary complaint filed alleging any misconduct after the date of the complaint, that is, after December 10, 1970. There-

fore, the net of it is that the time period we are speaking of in connection with this action is December 10, 1966, to December 10, 1970.

Of course, evidence by way of backgroud was introduced about events occurring before December 10, 1966. There was some evidence to some extent about such events and there was a little bit of evidence about events occurring after December 10, 1970, again by way of providing some follow-up in the way of narrative.

But the basic time period we are talking about is December 10, 1966, to December 10, 1970. I should also note that the original case involved a host of other defendants besides the ones you heard about in court, Ford Motor Company, Chrysler, American Motors, a number of banks, newspapers, Better Business Associations, and so forth. In order to attempt to get the trial handled efficiently, we severed the issues as to General

Motors and its dealers, and the one trade association, and that is what we are dealing with at this trial. Other phases of the case remain to be decided.

As far as Nabcor's business is concerned, it started in 1966 and lasted, according to the evidence, until the Spring of 1973, although we really don't know much about what happened after December, 1970.

As you know, the business of Nabcor was initially to sell what were called brokerages and the concept was that Nabcor's brokers located in different localities, would operate with little or no overhead, they would operate without the showroom of a regular automobile dealer, that is, a regular General Motors or Ford or Chrysler dealer.

These brokers would operate perhaps out of their filling station, they might operate out of their home or out of a little low-cost office,

something like that.

These brokers would, as I have said, not have a showroom, not have an inventory of cars to show or demonstrate, and they would not have an inventory of spare parts and they would not have repair facilities.

They would offer to sell cars of all makes and models. They would not be limited to General Motors or Ford or Chrysler.

Furthermore, the idea was they could offer these cars at a much lower price than the usual retail price of a dealer.

Nabcor's place was to head the system in a kind of administrative fashion and its most important function, in addition to selling these franchises, was to procure the cars.

In 1967 and 1968 two tiers or additional tiers of brokers were conceived of. In 1967 you had the concept of the master broker, and the

master broker would be a kind of intermediary between Nabcor and the regular brokers. The master broker would sell brokerages. The master broker at least in theory was supposed to develop its own sources of supply for automobiles so that the brokers could order cars from the master broker and the master broker would get cars.

If I haven't said it already, originally Nabcor was to get the cars and when the master brokers came in, the master brokers were also to help get cars.

There was also in 1968 introduced a concept of an area broker, an echelon between the master brokers and the regular brokers.

In general, at least in the first stages,

the regular broker paid $5000 for his franchise. He might pay cash, he might pay notes or he might pay a combination of cash and notes.

The master brokers apparently would pay somewhere between $25,000 and $50,000 for their franchises. The area brokers would pay about $6000.

Let's come to the crucial question of obtaining sources of supply of cars. Although there is evidence about two master brokers obtaining cars independently of Nabcor, the vast majority of the cars about which there is evidence, were obtained by Nabcor.

Nabcor proposed to buy cars in volume. Under well-established and legal business practices, Nabcor could not buy from General Motors or Ford or Chrysler directly. Those manufacturers only sell, with some possible exceptions not

applicable here, to franchised dealers. General Motors sells to franchised Buick dealers, Chevrolet dealers, Pontiac dealers and so forth.

So in order to get General Motors cars, Nabcor had to purchase them from dealers. Nabcor's proposal, at least in theory, was that it would buy in volume from large franchised dealers and would buy at a very small mark-up, something like $25 or $50 or thereabouts, above what the dealer paid the manufacturer.

It is very important to note that Nabcor would not itself accumulate any inventory. Nabcor, like the brokers, was not in the business of having an auto showroom or having inventory or having repair facilities or having spare parts in stock. Nabcor would only respond to orders placed by its brokers, and if a broker sent in an order, then Nabcor would seek to fill that order by placing it with a dealer.

I think it's obvious from what I have already said that down farther in the line the broker would not do anything other than respond to orders. The broker would get an order from its customer and then place the order with Nabcor and Nabcor placed the order with the dealer. That's the crucial fact about the supply system, that the amount and type of cars needed by Nabcor was determined by how many orders were obtained by its brokers from customers and forwarded to Nabcor.

Now back to the situation where Nabcor does obtain a car. Nabcor has gotten an order from a broker, and let's assume that Nabcor placed the order with a dealer and gets the car for $25 or $50 above the dealer's price.

I won't get into the technicalities of title and agency, but, basically, that car is then resold to the ultimate customer, the customer of

the broker. In general it appears from the evidence that the customer paid about $200 or $225 above what Nabcor had paid. So the net result was, if all this worked out, that probably the customer would be getting a car at a price considerably less than if the customer had gone to a franchised dealer and paid the regular retail markup.

We all know that there are lots of variations in the price of cars depending on whether the market is short or glutted or what, but, in general, the concept was that this device would mean that Nabcor's customers could get the benefit of a low markup by the dealer to Nabcor, and another fairly low markup by Nabcor to the customer.

This $200 or $225 profit which was obtained would be divided, according to particular formulas, between Nabcor and the broker, or if

there was a master broker or an area broker in the picture they would get their share.

Whatever merits this type of business had, it had certain inherent problems which would inevitably exist without any alleged conspiracy involving General Motors or any other manufacturer.

First of all, Nabcor would have to persuade a dealer or dealers to sell to Nabcor at what is obviously a very low markup considering what the dealer might be able to get in a regular retail sale.

Of course the concept was that Nabcor was buying in volume. So in theory at least Nabcor might be expected to produce the volume. But in any event, there was the matter of inducing a dealer to part with its cars at a markup of $25 or $50 and possibly some slight additional profit to the dealer, depending on certain discounts or what have you. But, in any event, it would be a

low markup compared with the regular retail mark-up.

Moreover, the brokers out in the field would lack showroom facilities or inventory, and although this had an advantage in cutting the overhead it also meant that they could not show actual cars, they could not demonstrate actual cars.

As I said before, Nabcor started functioning in 1966. In 1966 Nabcor sold 52 brokerage franchises and the evidence indicates that for those franchises Nabcor obtained about $150,000 in cash and about $80,000-odd in notes for a total of somewhere around $235,000 in cash and notes. These are approximate figures, but I think they're reasonably close.

In 1967 Nabcor sold 36 regular brokerage franchises and four master broker franchises.

In 1968 Nabcor sold eight regular

franchises and two master broker franchises.

In 1969 Nabcor sold 14 area broker franchises and five master broker franchises.

In 1970, before December 10 of that year Nabcor sold 22 regular broker franchises, three area broker franchises, and three master broker franchises.

I think I have already indicated, basically, the process, that the concept was for the broker to get the order from the customer and submit it to Nabcor or in some cases to a master broker, and either Nabcor or the master broker would obtain the cars from the dealer.

In practice the system did not generate nearly as much business as was contemplated. I think the following is an indication of that, although there are many indications. Of the 52 brokers who were signed on in 1966 about 24 or 25 of them never submitted an order. Another dozen

or so of these 52 brokers submitted four orders or less. I'm talking about the entire period up to December 10, 1970.

It appears that there were a total of 145 brokers who took out franchise agreements prior to December 10, 1970. These are listed on a particular exhibit. Of these 145, 68 of them never submitted a single order at any time up to December 10, 1970. 58 of them submitted less than ten during the entire time up to December 10, 1970. 11 of them submitted between 11 and 20 orders, and only about eight of them submitted more than 20 orders. Lest anyone think that General Motors or any of the defendants on trial here were somehow interfering with dealings between brokers and potential customers, there is no such evidence.

Now we come to the claim that General Motors conspired with its dealers to prevent

Nabcor and the Nabcor system from obtaining cars.

In this connection there are basically two types of activity which plaintiffs have relied upon in the claim of conspiracy to prevent Nabcor and its system from getting cars.

The most important alleged type of activity in this regard is alleged specific failures to fill specific orders given by Nabcor or a master broker to a dealer.

A second type of activity is the alleged refusal to make a commitment for a large number of cars to be purchased in the future, in advance of specific orders for those cars. This has reference to the evidence about the alleged situation in Buffalo in the fall of 1967 where plaintiff General, a master broker, claims that it tried unsuccessfully to get commitments for 200 to 400 cars from different dealers.

With respect to the first type of alleged

refusals to deal, the plaintiffs have provided a specification of the instances where they allege that Nabcor placed orders with a General Motors dealer and that dealer refused to fill the order or cancelled the order and this specification of course relates to instances where the plaintiffs claim this type of cancellation or refusal to deliver was the result of the alleged combination or conspiracy.

Naturally, if there was a failure to deliver, or a cancellation that had nothing to do with the alleged conspiracy, it would not be a part of plaintiffs' case. So plaintiffs have furnished a specification of the instances where plaintiffs claim that Nabcor placed orders with dealers and where the dealers refused to deliver or cancelled because of alleged conspiratorial activity.

This specification is contained in a group of documents which have been marked Plaintiffs'

Exhibit 699 for identification. I will refer to Exhibit 699 in my further remarks.

In connection with the second type of alleged refusal to deal, the refusal to make commitments, I should allude here to something in addition to the alleged Buffalo activity in the fall of 1967. I believe that is a claim of another instance of such activity; that is, an instance where Paragon Oldsmobile, a defendant in this action, in December of 1966, or possibly January 1967, refused to make some kind of commitment.

I'm really probably rephrasing that claim stronger than the plaintiffs' counsel even states it, but I have examined the evidence and it really merits no further discussion. The evidence about it is too ephemeral, entirely lacking in any specification of a request for a commitment or a specific car, and there is

nothing in that evidence which could possibly form the basis for any jury to find there was a refusal to make commitment at all, and I will make no further discussion of that evidence as to Paragon Oldsmobile.

I sould note at this point that Nabcor kept a log, which apparently is substantially complete, as to the orders it received from brokers. However, it does not in all cases provide a very good history of what happened to those orders, and it has been difficult to arrive at anything like a complete reconstruction of what happened to those orders, although there are other records besides the log which have been useful.

General Motors has gone to great labor to try to reconstruct on the basis of all the records what happened to those orders; so there is a reconstruction which has been made for purposes of this action which is probably about as good as

can be done at this stage, but it is not perfect because there are certain records and there is certain information which is simply lacking.

On the question of the conspiracy to boycott, the so-called Black List theory advanced by the plaintiffs, there is absolutely no direct evidence at all that anyone at General Motors at what is called the corporate level of General Motors, that is, with authority over all the divisions, directed a boycott of Nabcor.

There is evidence that persons at high levels in General Motors were advised of Nabcor as a potential competitor of the dealers; but that is a perfectly legitimate business activity.

It is perfectly legitimate for any business to keep advised of the competition, inform itself of the competition, and that activity, under no stretch of the imagination, in and of itself, can be called illegal; but I return to the

proposition which I am convinced of, that as far as any direct evidence of conspiratorial activity at the General Motors corporate level there is simply none.

Furthermore, there is no direct evidence of any agreement among the divisions — and I'm referring now to the motorcar divisions, Cadillac, Buick, Oldsmobile, Pontiac, Chevrolet, those five divisions — or within any single division — by any person or group of persons for the purpose of directing or carrying out a boycott of Nabcor or its system.

The real question in the case relates to circumstantial evidence, because that's where the reliance is placed by the plaintiffs. They claim that the circumstantial evidence adds up to the alleged conspiracy.

After an exhaustive review of the evidence as a whole, I find and hold that there is no

circumstantial evidence and no evidence at all of any kind which would permit this jury to find that there was a conspiracy on the part of General Motors or any of its divisions to boycott Nabcor or its system.

At this point I think I should explain that there are two types of so-called years with which we have been involved. Naturally there is the chronological year, January 1, of a particular year, to December 31, of a particular year; but there has also been reference to model years. The model years are important in the chronology and will be referred to by me in my subsequent discussion.

The model year starts, according to the evidence, with the placing of orders and possibly some deliveries in the early fall. If we are speaking of the model year 1968 — cars of the model year '68 are ordered and delivered

commencing with the fall of 1967 through the summer of '68.

The most salient factor in my view in positively rebutting any inference of boycott or Black List conspiracy on the part of General Motors is as follows:

The time span involved in this action is December 10, 1966 to December 10, 1970. If we take the last three and a half years of that time span, that is, from mid-1967 to the end of 1970, there are only three instances listed in this Exhibit 699 as claims of refusals by General Motors dealers to fill orders for cars by Nabcor.

That's three instances over a three and a half year period. One of these instances relates to a Buick ordered from a dealer named Cunningham in September of 1968. Cunningham cancelled and the Buick was reordered from another dealer and delivered.

So that car was not actually, ultimately, denied Nabcor. The car was ultimately obtained. So there was an isolated example of one Buick dealer cancelling and the order immediately being placed with another Buick dealer and being filled.

There was also the instance of the Askew Chevrolet where there was an order by a man by the name of Askew in Washington for a Chevrolet in the fall of 1968 and he didn't get his car; by mid-1969 he cancelled his order.

But those obviously are two isolated instances out of hundreds in this entire three and a half year period.

At the beginning of my discussion here I mentioned there was a third instance of refusals to deliver referred to in Exhibit 699. But this relates to Cadillacs ordered in November and December of 1970; although those Cadillacs are

listed in 699, it's now agreed that they're out of the case. They came too late. There is no evidence about them. So the Cadillacs at the end of the period, the third so-called instance of non-delivery contained in Exhibit 699, are just out of the case.

The net of it is that you have two isolated claims of non-delivery in this three and a half year period, cases where specific orders were denied and, indeed, one of them was ultimately filled by a second Buick dealer.

Let's put those instances in perspective as to what else was going on in this three and a half year period. Here's where I want to talk about the model years. It happens that this three and a half year period involves three model years. The time period I'm talking about, that last three and a half years, starts in the summer or fall of 1967.

That's the beginning of the 1968 model year, and then after that you have the 1969 model year and the 1970 model year.

The 1970 model year finishes up in the summer of 1970 and, of course, the time period in our lawsuit goes to December 10, 1970. One would think we would have some question about the 1970 model year or the first phase of it in the fall of 1970, but in the fall of 1970 there was a strike at General Motors and no cars were produced, so there is not any real issue in this case about what was happening in the fall of 1970.

I repeat: The last three and a half years of the time period involved, the three model years, are the 1968 model year, the 1969 model year and the 1970 model year.

Let's take it make by make for these three model years involved in the last three and a half years of this lawsuit.

Let's start with Chevrolet.

The first delivery of a 1968 model Chevrolet was made in November, 1967. It was Order No. 375.

Now, Nabcor's order log, Exhibit 450, shows 49 orders received by Nabcor from its brokers for 1968 Chevrolets. It shows 39 1968 Chevrolets delivered by Chevrolet dealers to Nabcor.

The evidence shows that Nabcor received 32 orders for 1969 Chevrolets from its brokers and the evidence further shows that Nabcor received delivery from Chevrolet dealers of 30 Chevrolets.

The evidence further shows that Nabcor received from its brokers orders for 37 1970 Chevrolets. The evidence shows that Nabcor received delivery from Chevrolet dealers of 39 1970 Chevrolets. Exactly why the deliveries exceeded the orders I don't know, but that is a frailty of the record-keeping system.

The net of it is that for these three model

years Nabcor received orders from its brokers for a total of 118 Chevrolets and it received delivery from General Motors dealers of 106 Chevrolets.

There is a gap of 12, but I would find quite readily that gap of 12 is contrary to the idea of a conspiracy to boycott and, in any event, there is no claim by the plaintiffs that any of those 12 cars that were not delivered by the dealers involved any incident of conspiratorial conduct, except for the so-called Askew Chevrolet. This matter will be dealt with later in my statement.

The source of those Chevrolets for those three model years was Rohrer Chevrolet in Camden, New Jersey, although a few isolated purchases were from Matt Slap in Philadelphia, Norton in Philadelphia, Queen City Chevrolet in Cincinnati, Cerota Chevrolet in New Jersey and Luby Chevrolet in Queens.

With regard to the other makes of automobiles

for these three years I think I will omit going year by year. The statistics are contained in the books prepared by General Motors, but I will give you the totals.

For the three model years 1968, 1969, 1970, Nabcor's order log reflects 109 orders for Pontiacs received by Nabcor from its brokers, and the record reflects 106 Pontiacs for these three model years delivered by General Motors dealers to Nabcor. That is 106 out of 109.

There is no claim in Exhibit 699 that there was any refusal to deliver or any cancellation by a dealer resulting from conspiratorial conduct in relation to these three model years of Pontiacs.

The source for most of the cars for these model years, that is, most of the Pontiacs, was Al Wilson Pontiac located near Philadelphia, which was the source for '68 and '69 model years and did steady business with Nabcor through June, 1969.

Nabcor also purchased Pontiacs for those two model years from Block and Ruckle, two Pontiac dealers. Starting about October, 1969, for the 1970 model year, the main source of Pontiacs for Nabcor was Kline Pontiac in Doylestown, Pennsylvania, although there were a few purchases of 1970 Pontiacs from Apuzzo Pontiac.

For Oldsmobiles, the order log of Nabcor reflects that for these three model years there were a total of 26 orders received by Nabcor from its brokers. The records are slightly uncertain as to the total amount of deliveries obtained from Oldsmobile dealers, but it was either 20 or 21, and there is no allegation in Exhibit 699 that for those three model years there was any failure to deliver an Oldsmobile resulting from any conspiratorial conduct.

For these three model years, Nabcor bought from Al's Community Olds and from Marty Motors.

Those were the two sources of Oldsmobiles.

We now come to Buick for these three model years, 1968, 1969 and 1970. The orders for Buicks for these three years reflected in Nabcor's order log were 64. Again, there is slight confusion in the record as to how many deliveries were made for these three model years by Buick dealers to Nabcor, but it was either 58 or 59.

Again, there is no claim in Exhibit 699 of any refusal to deal resulting from alleged conspiratorial conduct, except the situation which I mentioned earlier where one isolated Buick was cancelled by one dealer and reordered from another.

There is no evidence whatever to tie that transaction to any conspiratorial conduct.

For these three model years, Nabcor bought Buicks from Bano Buick, and from Bell Buick, which later became known as Foy Buick.

The final make of automobiles to be dealt

with are Cadillacs and Nabcor did very little business in Cadillacs, at least for these three model years.

The order log shows 16 orders for 1968, 1969 and 1970 Cadillacs, received by Nabcor from its brokers, and the records show that nine Cadillacs were delivered.

There is no evidence whatever to indicate that any of the undelivered Cadillacs were the result of any conspiratorial activity by General Motors.

During this time Nabcor was buying Cadillacs from Marty Motors and from a company called Burke Cadillac.

I have gone through Nabcor's purchases for the three model years 1968, 1969 and 1970, embracing the last theee and a half years of the period in suit. I would like now to allude to what happened to the master brokers who were

ordering cars directly from dealers. That is General Auto Sales & Leasing and also Nabcor of East New York.

Beginning in December, 1967, General purchased at least 31 General Motors cars and two General Motors trucks. These are transactions which apparently can be identified. There were probably a few more purchases, perhaps up to about 36 or 37 cars, but there is no specific identification of the transactions.

All of these purchases by General related to the model years beginning with the 1968 year, and were in Buffalo, New York. 22 Chevrolets were bought from Gillogly Chevrolet, 3 Pontiacs from a dealer by the name of Brown. Oldsmobiles were ordered or bought, according to the identified transactions.

There were 5 Buicks bought from Paul Batt Buick and 1 Cadillac bought from Keyser Cadillac.

There were also 2 General Motors trucks bought from Meier Schule.

Nabcor East bought mainly through Nabcor, but made at least 6 direct purchases for 1968, 1969 and 1970 model years. Nabcor East bought 1 Oldsmobile from Marty Motors, 2 Buicks from Bano Buick and 3 Pontiacs from Apuzzo.

I would like to sum up the grand total for 1968, 1969 and 1970 model years. The number of Nabcor purchases from General Motors dealers of the five makes of cars, and including the minimums where there was a difference in the figures, were as follows:

Chevrolets 106; Pontiacs 106; Oldsmobiles 20; Buick 58; Cadillacs 9, a total of 299 cars.

In addition to that, General purchased 31 cars and Nabcor East purchased 6. The total of all those figures is 336 cars. So there were 336 cars and 2 trucks bought by Nabcor, General

and Nabcor East, during the last three and a half years of this lawsuit relating to the 1968, 1969 and 1970 model years.

These vehicles were purchased from a total of 20 General Motors auto dealers and one truck dealer.

I think on this evidence no jury in my view could possibly and reasonably find that General Motors engaged in a conspiracy to boycott or deprive Nabcor and its system of automobiles during that last three and a half year period involved in the lawsuit.

In connection with the number of dealers it should be pointed out that by and large Nabcor sought to obtain a single source of supply to the extent possible for each make of cars. Of course, it may have made isolated purchases from other sources of supply at the time it was dealing with its main source of supply for a particular make.

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These sources of supply changed from time to time, but Nabcor was only seeking to deal with a limited number of dealers to supply its demands. Obviously, the same was true with respect to General and Nabcor East.

The dealers with which Nabcor dealt and with which Nabcor East dealt were in the Philadelphia-New York area mainly, although there were one or two dealers dealt with in New Jersey.

Of course, General bought its cars in the Buffalo area.

I have mentioned the last three and a half years, and that leaves the first half-year. I believe it is necessary to analyze the evidence about that first half-year. We are dealing with a period of time between December 10, 1966, and approximately June, 1967. Of course, we have received evidence by way of background of events occurring earlier in 1966 than December 10.

Again, in connection with this first half of year of the alleged conspiracy, I will try to analyze the evidence according to the different makes of cars. I will start with Chevrolet.

Nabcor's first main source of supply for Chevrolets was Luby Chevrolet of Queens. Nabcor bought at least 14 Chevrolet from Luby from June, 1966, to March, 1967.

In connection with the 1967 model year the records of Nabcor present somewhat greater problems than with respect to subsequent model years. The evidence for the 1967 model year shows certain deliveries obtained by Nabcor identified by serial number, and these deliveries are definitely established.

In addition, the records indicate the probability that substantial numbers of additional cars were delivered, whose serial numbers are not identified in the available records.

In any event, during the period June 6, 1966, through March, 1967, Nabcor bought about 14 Chevrolets from Luby at a minimum and probably bought more, the maximum figure being about 27.

Nabcor and Luby terminated their business relationship in March, 1967. Actually the last order taken by Luby was somewhat earlier, although the last delivery was in March.

Although the jury could find that it was Luby, not Nabcor, who severed the relationship, there is no evidence as to the reason, and no evidence that any conspiratorial conduct of General Motors was responsible.

At about that time Nabcor switched for its source of supply of Chevrolets to Matt Slap of Philadelphia and between January, 1967, and July, 1967, that is for the rest of that model year, Nabcor bought at least 16 cars from Matt Slap, probably more.

Nabcor also bought at least 10 Chevrolets from A.C. Chevrolet in the period April to July, 1967.

So for the last part of the 1967 model year, Nabcor's main sources of supply for Chevrolets were Hatt Slap and A.C. Chevrolet.

In this Exhibit 699 there are certain allegations and claims of denial of cars because of alleged conspiratorial activity for the 1967 model year. I will deal with them now.

It is claimed that in late 1966 Nabcor placed an order for 10 or 11 Chevrolets with a dealer in New York City by the name of Don Allen Chevrolet Company. There really is no dispute those orders were placed.

It is further undisputed that in early December, 1966, Don Allen Chevrolet, which had been an independent franchised dealer of General Motors, ceased to function as such and that

that dealership was taken over by General Motors and renamed Mid-Town Chevrolet.

Thereafter the dealership simply functioned as a branch of General Motors.

Treating the evidence most favorably to the plaintiffs' side, it would appear that when Mid-Town took over, the 10 or 11 Chevrolets that had been ordered by Nabcor was held up by the Mid-Town personnel who were employees of General Motors.

Frank Maiorana has testified that he complained about this hold-up and talked to two persons at Mid-Town. Mr. Maiorana states that they at first told him he could not get the cars, told him that Nabcor was bootlegging and did not have a fleet certificate, and further told him that Mid-Town was not in the business of selling to bootleggers who would compete with franchised dealers; that Mid-Town was interested in holding

up the price for the benefit of franchised dealers.

For purposes of this motion I must assume the truth of that testimony. However, the net result of all of it was that shortly after these conversations Maiorana, to allow Nabcor to take delivery of these cars. But Nabcor cancelled all of those orders except 2.

There are two points to be noted about the Mid-Town transaction. One is that the statements attributed to the two Mid-Town personnel might be considered as part of some evidence of conspiratorial intent or activity on the part of General Motors if there was other evidence to add to it, indicating conspiratorial intent and activity.

I don't want to treat the Midtown situation entirely in isolation. Part of the job here is to take these isolated instances and see how they add up, and I have analyzed the evidence in that fashion. But, as already indicated, I have con-

cluded that, taking the plaintiffs' evidence as a whole, there is no sufficient evidence from which a jury could find conspiracy.

However, taking the Mid-Town situation in and of itself, some further things can be said. One is that Mid-Town was simply a branch of General Motors, and General Motors has a right unilaterally not to sell Nabcor cars. As far as the antitrust laws are concerned it has that right.

If Mid-Town refused to deliver those cars it might constitute a breach of contract action but not a violation of antitrust laws. A familiar antitrust doctrine is that someone has a right to refuse to deal provided they don't get involved in contractual arrangements with other people to boycott.

Secondly, the salient fact is that the net result of the conversations at Mid-Town was to offer Nabcor the ten or eleven cars and Nabcor

cancelled all but two.

Now we come to the second claim about 1967 Chevrolets contained in Exhibit 699. 699 contains allegations that there were three cars denied Nabcor by Luby Chevrolet, and apparently the theory is that that was the result of conspiratorial activity in the part of General Motors. There was indeed one Chevrolet ordered by Nabcor from Luby in November of 1966 and this was cancelled. However, there is no evidence whatever as to why it was cancelled or who cancelled it.

Also the November, 1966 order from Luby occurred in a month when between nine and 15 Chevrolets were delivered by Luby to Nabcor.

The other Luby Chevrolets referred to in Exhibit 699 were ordered by Nabcor from Luby on December 21, 1966, and on January 11, 1967. As indicated earlier, a jury could find that at the beginning of 1967, Luby decided to stop doing

business with Nabcor, at least on a steady basis.

The jury could certainly find that this compelled Nabcor to reorder those cars, and it did, in fact, reorder the cars from Matt Slap, to whom it turned at this time for its source of supply of Chevrolets, and those cars were delivered by Slap.

The claim is that Luby's cessation of dealing with Nabcor on a regular basis was the result of conspiratorial activity. There is no evidence whatsoever to support that claim. There is no evidence regarding the reason why Luby terminated, and in the absence of such evidence, one could speculate about any number of possible reasons why the business terminated.

There is no evidence connecting General Motors to these cancellations or to the termination of business.

In respect to this first period of the lawsuit ending in the summer of 1967, I must also

deal with two claims embraced in Exhibit 699 relating to A.C. Chevrolet. It is claimed that Nabcor ordered a car from A.C. Chevrolet on April 11, 1967, and that this order was cancelled.

There is also another car which was cancelled at some point around June with respect to A.C. Chevrolet. But again, there is no evidence whatever tying these cancellations to conspiratorial activity or to General Motors.

Indeed, the evidence positively indicates that what was happening with A.C. Chevrolet was that they were palming off demonstrators as new cars and Nabcor decided to drop A.C. Chevrolet.

My conclusion regarding Chevrolets relating to the first half year of the conspiracy is as follows:

The records are not in the best shape, but the order log shows 55 orders for Chevrolets relating to the 1967 model year, that is, from the

fall of 1966 to the summer of 1967 — and I'm referring to orders from Nabcor brokers to Nabcor. A minimum of 41 Chevrolets were delivered by Chevrolet dealers to Nabcor during this time.

The evidence shows clearly that there were more than the 41. How many more I cannot say, but the maximum possible under the records is 67. Nabcor dealt during this time with eight different Chevrolet dealers. My conclusion with regard to Chevrolet transactions in the first half year of the conspiracy is that there is no evidence from which a jury could conclude that there was a conspiracy by General Motors and others to prevent delivery of Chevrolets to Nabcor.

Now we come to the Pontiac transactions in the first half year or so of the conspiracy.

In the early stages of Nabcor's business Nabcor's source of Pontiacs was Ruckle Pontiac of Yonkers, New York. Nabcor bought at least 25

Pontiacs from Ruckle during the period June, 1966 through March of 1967.

In March of 1967 Ruckle decided that it would do no further business with Naboor and it sent back nine outstanding orders. Naboor contends that the cancellation and return of these nine orders and the cessation of business is tied to conspiratorial activity on the part of General Motors. However, the only testimony as to the reason why Ruckle cancelled its business with Naboor was to the effect that Ruckle did so entirely by its own decision and was not responding to pressure or suggestion or agreement with General Motors.

It is true that Mr. Dillon of Ruckle testified that shortly before his decision to cancel his firm's business with Naboor, a Mr. McNamara from General Motors came to see him.

However, Dillon's testimony, which is uncontradicted and unimpeached, is that McNamara

did not suggest a cessation of business with Naboor. McNamara simply said, "I have a relative or a friend who is interested in buying a Naboor franchise. Can you tell me something about it?"

Dillon testified that he did not personally know about Naboor at the time, but was told about Naboor by his fleet sales manager, Stewart. Dillon concluded that Naboor was a ripoff and he decided he didn't want to sell to Naboor any more.

It might be a suspicious circumstance that a General Motors representative arrived and talked with Dillon shortly before Dillon's decision to cancel out the business with Naboor. One might be skeptical about Dillon's testimony and one might wonder whether something else was said in place of what Dillon said was said.

However, McNamara was not called as a witness and no testimony is in this record contrary to what Dillon testified to.

It should also be noted that Buckle Pontiac was in the New York Zone of Pontiac. Immediately after the cancellation and return of the nine Buckle orders to Nabcor, Nabcor started buying Pontiacs from Bates Pontiac. Bates Pontiac is in the Bronx. Bates Pontiac is also in the New York zone of the Pontiac division.

Nabcor bought Pontiacs from Bates during the period March, 1967 through part of June, 1967. In Exhibit 699 there is a complaint about five Pontiacs ordered from Bates in May of 1967 which were not delivered. Nabcor and Bates ceased doing business in June of 1967. But there is absolutely no evidence as to the reason for the non-delivery of the five orders. There is no evidence as to who cancelled. There is no evidence whatever regarding the reason why Nabcor and Bates ceased doing business.

There are any number of possible reasons why

Nabcor and a dealer might stop doing business with each other. The mere cessation of business cannot lead to any inference of conspiratorial conduct by General Motors.

Indeed, Nabcor immediately replaced Bates as a source of supply in June of 1967, and it went to Al Wilson Pontiac in Philadelphia and bought Pontiacs from Al Wilson from June of '67 through June of 1969, and bought at least 86 Pontiacs from Al Wilson.

So, to summarize the situation about Pontiacs through the summer of 1967, the order log reflects 64 orders received by Nabcor from brokers for Pontiacs during this time; at least 51 and a maximum of 71 1967 Pontiacs were delivered by Pontiac dealers to Nabcor. They came from four Pontiac dealers.

Taken with all the other evidence in the case I find that there is no evidence from which a jury

could conclude there was a conspiracy during this first half year of the alleged conspiracy period to deprive Nabcor of Pontiacs.

The source of Buicks for Nabcor the 1967 model year, that is through the summer of 1967, was mainly Kutner Buick, although purchases were also made from a company called Sharkey Buick. The only complaint in Exhibit 699 about Buicks in respect to the 1967 model year is in relation to a Buick which Nabcor ordered from Kutner in May of 1967. It apparently did not turn out to be acceptable because the tires were oversized. There is no evidence at all tying this to any conspiracy.

So as far as Buicks are concerned, the log reflects 32 orders from brokers to Nabcor. Due to the difficulties in the records the number of deliveries made by Buick dealers to Nabcor is not definitely fixed. It was at least 21 and a

maximum of 31 Buick cars. Again, there is simply no evidence of any conspiracy to deprive Nabcor of Buicks during this first half year of the alleged conspiracy.

With regard to Oldsmobiles, the only claim in Exhibit 699 respects one Oldsmobile ordered from Rosenstock in May of 1967. Nabcor claims there was a refusal by Rosenstock to accept the order. There is simply no evidence of what happened here and the reason why that transaction turned out the way it did.

The summary of the Oldsmobile transactions at this time is that the order log reflects nine orders received by Nabcor for 1967 model Oldsmobiles. Either eight or nine Oldsmobiles were delivered for the 1967 model year.

Nabcor obtained Oldsmobiles from three Oldsmobile dealers, Kraus, Rosenstock and Al's. There is no evidence that a jury could find a

conspiracy to deprive Nabcor of Oldsmobiles during this time.

I would like to take a recess. I have some more of my statement to dictate. The jury is welcome to stay or they are welcome to leave. If you are interested you can stay, if not, as far as the case is concerned and the requirements of the case, since I am dismissing the case, why, the jury is discharged and I want to extend to you at this time, in case any of you wish to leave, thanks for your hard work, your obviously close attention, and your patience during our numerous legal discussions. You did a fine job as citizens. This is all part of the process, no matter how it turns out. You have certainly done your job.

If you would like to stay, I'll continue with this and you can do as you wish. I would appreciate it, however, there be no discussion

although you are discharged from your duties. It would be inappropriate of you to have discussions of any kind with any of the counsel. If you are going to stay, keep to the jury room as per usual.

MR. PERSON: Does that mean after even they leave the court we won't be able to communicate with them?

THE COURT: I'll cover that later.

MR. PERSON: So they may know before departing.

THE COURT: What I would say is you are free after you leave the court to talk to whomever you wish about the case. However, you are free not to talk. No litigant and no lawyer has any right to harass you or impose upon your time or do anything that would inconvenience you or disturb you in any way. You are perfectly free to refuse to talk. It is entirely up to you from here on out.

If any litigant or any lawyer imposes upon you, or disturbs you, you are to call my office

immediately and I will remedy the situation.

MR. PERSON: I would like to object to that instruction if it's meant —

THE COURT: There is no objection, none.

MR. PERSON: I would like to contact them and if they wish to talk —

THE COURT: I made it clear. This is a very standard instruction. I'm giving it and I'm giving it for the guidance of all concerned and for the benefit of all concerned.

We'll have a recess.

(Recess)

THE COURT: I will resume my statement. I left off before I came to the Cadillac situation in respect to the 1967 model year, that is, the Cadillac situation up through the first half year of the period in suit.

This brings us to the mysterious Colonial Cadillac orders. Although Nabcor never received

for any model year subsequent to 1967 in excess of eight orders for Cadillacs, Nabcor contends that in the Fall of 1966 it received some 45 orders for 1967 model year Cadillacs.

The records show that 3 1967 Cadillacs were obtained from General Motors dealers, namely, from Wayne and Marty. However, Nabcor contends that it placed orders for 43 Cadillacs with Colonial Cadillac of Trenton, New Jersey; that these orders were placed with Colonial in the Fall of 1966, and Nabcor contends that due to conspiratorial activity, none of the 43 orders were filled by Colonial.

Two witnesses from Colonial Cadillac appeared at the trial. They denied having any knowledge of such orders. No records of Colonial Cadillac reflecting such orders have been found despite rather unusual efforts to locate them. These efforts included obtaining the return of some

documents from the Department of Justice, which Colonial Cadillac had furnished to the Department at an earlier time in connection with the antitrust complaint of Nabcor.

The documents of Colonial which were surrendered to the Department and returned during this trial contain no records whatever of the 43 alleged orders. Except in the case of two or possibly a very few more instances, Nabcor came up with no copies of any order documents. However, Frank Maiorana has testified the orders were placed with Colonial and if the jury believed Frank Maiorana they could find that these orders were placed. The jury could conclude, if it believed Frank Maiorana, that Nabcor placed the orders with Colonial, and none of the orders were filled.

When I say none of the orders were filled, I have to qualify this because Frank Maiorana did admit that in a couple of cases Colonial Cadillac supplied cadillacs for these orders, although the

particular cars offered were not precisely what had been ordered.

The main question, however, is this: Could the jury find, would the jury have any evidence on which it could find, that the alleged refusal by Colonial to deliver these 43 cars resulted from any conspiratorial activity of General Motors?

The Colonial witnesses have testified that General Motors never communicated or took any other action to discourage or frustrate the filling of orders received from Nabcor. Indeed, there is no evidence from any source of General Motors communicating or performing any activity to frustrate the alleged Colonial orders.

Again, we have a situation where there might be many reasons why a dealer would not want to deal with Nabcor and in the absence of some evidence of conspiratorial activity in the part of General Motors as a cause for non-dealing

the jury would be in a position of simply speculating if the issue went to the jury.

I have considered the evidence about the Colonial transactions in relation to the various other evidence in the case, particularly in relation to the contention that a company named Marty Motors which dealt in Cadillacs and Oldsmobiles, engaged in some kind of subterfuge.

What I have reference to is the contention that Marty Motors, in selling Cadillacs to Nabcor at a later time, in 1968 and 1969, put the title to the cars in the Nabcor customer rather than in Nabcor, and the claim is that this was done because the Cadillac division didn't want Marty to deal with Nabcor and Marty was trying to conceal the transaction. The witnesses from Marty Motors have denied that their handling of the title to these cars had anything to do with any instructions or communications from the

Cadillac division.

Plaintiffs have introduced evidence of prior inconsistent statements in an attempt to impeach the testimony of at least one of the Marty Motors witnesses in this regard. The jury could certainly consider whether the Marty Motors witnesses were telling the truth.

However, there is on the present record simply no affirmative evidence that General Motors was pressuring Marty Motors not to sell to Nabcor or was communicating in any other way with Marty Motors in such a way as to cause Marty Motors to conceal the transactions.

In any event, there is no showing whatever that there is any connection between the Marty Motors situation and the Colonial situation. The Marty Motors situation is rather vague and deals with some isolated instances occurring much later than the Colonial Cadillac transactions or

alleged transactions.

In view of the evidence as a whole, I cannot find that there is any evidence from which the jury could conclude that the Cadillac division of General Motors or anyone else at General Motors was communicating with or pressuring either Colonial or Marty Motors not to sell Cadillacs to Nabcor.

The fact is that during the entire time in question -- I'm talking about the entire time up to December 10, 1970 -- the record shows that Nabcor received very few Cadillac orders, 22 orders if the alleged Colonial orders are excluded and 65 if they are included. A total of 13 Cadillacs was delivered by three or four dealers.

The alleged rush of Cadillac orders in the fall of 1966 was an aberration from the norm. The jury could certainly find that it happened.

But there is no evidence from which the jury could find the failure to obtain these alleged orders resulted from conspiratorial conduct on the part of General Motors.

Before going further in my statement, I should mention something which has been referred to frequently at the trial -- that is, the fleet certificate. There is a separate section of General Motors which handles the issuance of fleet certificates. These certificates are issued to purchasers of cars, such as auto leasing companies, which have a certain number of cars registered in their names. In this case, General Motors takes the position that the fleet certificate is pretty much a public relations device, and has no relationship, relevant to this case, to more substantial benefits such as fleet discounts or fleet allotments. The plaintiffs contend that, where a customer has a

fleet certificate, this is of assistance in obtaining cars, because a dealer can get a fleet allotment to supply those cars.

On the present record the jury could find that although there was no formal connection between fleet certificates and fleet allotments, there might have been a de facto connection which helped a fleet certificate holder to obtain cars under a fleet allotment.

But, as I have already indicated, this entire problem of fleet allotment is simply academic in the present case because there is no evidence whatever that any cars were denied to Nabcor because of the failure of any dealer to obtain a fleet allotment for such cars.

Plaintiffs have placed much emphasis on certain sporadic statements made by General Motors employees, which plaintiffs contend constituted conspiratorial conduct or admissions

of such conduct. For the purposes of this motion the credibility of plaintiffs' evidence in this regard will be assumed.

Frank Maiorana testified that he spoke to Walter Gray of the New York zone of Pontiac in November or December, 1966 on the subject of obtaining a fleet certificate for Nabcor. Frank Maiorana testified that Gray referred to Nabcor as a bootlegger, and that no fleet certificate was obtained.

Although Gray allegedly used the pejorative term "bootlegger", he did not in fact threaten any boycott or other conspiratorial conduct, or say anything to admit such conduct. As to the fleet certificate, the evidence is conclusive that, under the rules and regulations of General Motors which were adopted entirely apart from any consideration of Nabcor or Nabcor-type companies, Nabcor did not meet the requirements for

obtaining such a certificate.

Certain other allegedly inculpatory statements were made at this period of time by employees of Midtown Chevrolet, a dealer owned by General Motors. These alleged statements have already been described. To recapitulate, Frank Maiorana testified that in December, 1966 or January, 1967 Englert of Midtown and his boss called Nabcor a bootlegger, stated that they did not wish to deliver certain Chevrolets to Nabcor at the low fleet price, and stated that Midtown was supposed to uphold a higher price for the benefit of other dealers. As already described, Midtown ultimately agreed to sell these cars at the low fleet prices, but Nabcor canceled all but two of the orders.

In connection with the allegations of statements by General Motors employees in the fall of 1966 or early 1967, I should probably refer to the

Pontiac employee, McNamara, who spoke to Dillon of Ruckle Pontiac in the fall of 1966. This conversation has already been described, and is to the effect that there was no threat to Ruckle or request that Ruckle cease dealing with Nabcor, and that Ruckle's cessation of business with Nabcor was solely from Ruckle's own volition.

In my view, when all the evidence is considered, a jury could not reasonably find conspiratorial conduct on the basis of these statements by General Motors employees.

When I say conspiratorial conduct I am, of course, speaking of conduct designed to prevent dealers from selling cars to Nabcor. In this regard, there is no direct evidence that Gray or McNamara or anyone else at Pontiac or General Motors was directing or requesting Pontiac dealers to refuse to deliver cars to Nabcor. Plaintiffs' argument is that the inference can

be drawn circumstantially from Gray's statement and McNamara's conversation with Dillon, and other evidence, that General Motors was in fact pressuring Pontiac dealers not to deal with Nabcor. However, I conclude that no such inference can logically be drawn, and that any finding of such pressure would be based on pure speculation.

The salient fact is that, after the Gray and McNamara conversations in November or December, 1966, Ruckle Pontiac kept selling cars to Nabcor, and delivered 22 cars from November, 1966 through March, 1967. At that point Nabcor immediately switched to another dealer in the same zone, the New York zone, Bates Pontiac, from which it obtained 18 cars from March, 1967 through June, 1967.

With regard to Chevrolets, the alleged statements of Englert and his boss were merely

the statements of two persons at a factory-owned Chevrolet dealer. As to any evidence of some person or persons higher up in Chevrolet or General Motors directing a boycott of Nabcor, there is simply no direct evidence of such activities. Nor is there any sufficient circumstantial evidence which would permit a jury to find such a boycott at the time we are discussing -- late 1966 and 1967. The fact is that Nabcor purchased Chevrolets from Luby Chevrolet in Queens until early 1967, and then switched to Matt Slap Chevrolet in Philadelphia and A.C. Chevrolet in Jersey City, from whom Nabcor bought substantial numbers of Chevrolets through the end of the 1967 model year.

The next matter which must be dealt with is the allegation of conspiratorial conduct by General Motors and franchised dealers in Buffalo in the fall of 1967.

Buffalo Automobile Dealers Association issued a bulletin on September 29, 1967 commenting most unfavorably on Nabcor and other auto brokers, and expressing the view that no retail dealer would want to get involved in such a scheme.

Nabcor's master broker in Buffalo, plaintiff General Auto Sales and Leasing, is claimed to have approached defendants Gillogly Chevrolet, Bain Chevrolet, Campbell Chevrolet, and Batt Buick in the fall of 1967. Plaintiffs' testimony is that these and other General Motors dealers were asked by General Auto Sales about supplying large numbers of cars over a period of a year — around 200 to 400 cars. The testimony is that, after some initial expressions of interest, the dealers refused to make commitments to General Auto Sales.

Donald Bolling of General testified that in early October, 1967 he witnessed an employee

of the Buffalo zone of Chevrolet named English threatening Gillogly Chevrolet that if any dealer was caught selling to Nabcor that dealer would have trouble getting cars.

Plaintiffs' witnesses have also testified that a representative of Bain Chevrolet said that that dealer could not sell to Nabcor because Chevrolet would not permit it.

However, the important fact about the proposals or discussions in the fall of 1967 is that, except for a trivial number of orders which the representatives of General were carrying around to offer as bait to the dealers, General was not seeking to place actual orders for cars at this time. Also, English, who allegedly made the threats at Gillogly Chevrolet, was a rather low level General Motors employee who could not commit the corporation to a course of conduct.

To the extent that General actually came back to any of these dealers with actual orders for cars, these orders were filled. Beginning in the very early part of 1968 and continuing through the end of 1969 at least, Gillogly, Bain, Batt and other General Motors dealers in Buffalo sold cars to General.

I should note that, as to Campbell, there is no evidence that General ever came back to that dealer with any specific orders.

Gillogly went so far as to request certain fleet rebates for General in the summer of 1968. The request was approved by the manager of the Buffalo zone of Chevrolet, Womack. Womack was the superior of English.

I should also refer to a situation about defendant Batt Buick. There is a claim that a Buick car was ordered by General from Batt in December, 1967; that it was delivered to Batt for

General in January, 1969; and that the car was withdrawn suddenly by General Motors and had to be reordered.

In light of all the circumstances, this is a matter of no consequence. The explanation for the recall upon the first order was there there was a malfunction, and there is no evidence to rebut this. Moreover, the car was immediately reordered by Batt and was delivered. Batt continued to supply Buicks to General thereafter.

There is another series of incidents which needs to be dealt with, which occurred in December, 1967 and January, 1968.

According to Anthony Maiorana's testimony, on December 12 or 13, 1967 there was a discussion at Habeer's office in Jenkintown, Pennsylvania between Anthony Maiorana and two General Motors employees named Speece and DiSimone. DiSimone was in the fleet certificate section of General

Motors. Speece was with the Philadelphia zone of Chevrolet. The reason for this discussion apparently related to an application by Rohrer Chevrolet, dated November 22, 1967, for fleet rebates on cars sold to Nabcor.

Anthony Maiorana testified that there was a discussion about the Nabcor system and about the fact that Nabcor obtained Chevrolets from Rohrer. The testimony is that Speece and DiSimone said that Nabcor was not qualified to buy and resell cars, that dealers would not sell to Nabcor for resale, and that they would see to it that Nabcor could get no cars for resale.

On December 15, 1967 Frank Maiorana had the first of a series of talks with a Mr. Belcher, an assistant to the chairman of the board of General Motors. Frank Maiorana claims that he told Belcher about various alleged problems about getting cars, including a problem in

Buffalo, and that Belcher suggested that a fleet certificate might assist in solving the problem. There is no claim that Belcher at any time made threats or made admissions of conduct of a conspiratorial nature.

During the time of the talks with Belcher, Frank Maiorana was referred to other General Motors employees, and discussed the possibility of setting up a small leasing company, with GMAC financing, for the purpose of helping Nabcor get a fleet certificate.

In the series of conversations, beginning December 15, 1967, the only alleged inculpatory statements occurred when Frank Maiorana claims to have talked to Speece and DiSimone. Frank Maiorana testified that Speece said that Nabcor was bootlegging. Frank Maiorana testified that DiSimone said that General Motors was not in the business of selling cars to resellers.

However, with respect to the actual activities of the Philadelphia zone of Chevrolet, plaintiffs' own evidence is that Matt Slap, a Chevrolet dealer in Philadelphia, was agreeable to selling Chevrolets to Nabcor for the setting up of the leasing company, and assisted in Nabcor's attempt to obtain financing from GMAC. The manager of the Philadelphia office of GMAC, Thomas, approved the financing application. The undisputed evidence is that the financing application, upon which this entire arrangement depended, was never indeed turned down by GMAC. GMAC attempted to obtain additional information from Frank Maiorana which he refused to provide.

Also, during these discussions, a General Motors employee named Karney, requested Frank Maiorana to provide specifics regarding Maiorana's complaints about mistreatment in Buffalo. Frank Maiorana refused to provide

such specifics.

A fact of overriding importance is that, at the time of these conversations in late 1967 and early 1968, Nabcor was obtaining, and continued to obtain, basically all the cars it ordered from various General Motors dealers. These included Pohrer Chevrolet, the dealer allegedly mentioned in the discussions between Anthony Maiorana and Speece and DiSimone.

There is an allegation that in 1969 a car ordered by a Mr. Askew in Washington, that is a Chevrolet car, was not delivered. Askew had turned in his order in 1968 and the claim is that that order was given to Matt Slap in Philadelphia and after several months no car materialized and the customer finally cancelled.

Frank Maiorana alleges that in trying to track this matter down he talked to a Mr. Lowe, an employee of the office of Chevrolet in Chevy

Chase, Maryland, and Mr. Lowe told him in Mid-1969 that General Motors was not supposed to be selling to dealers who were selling to resellers.

This is an unfortunate statement if it occurred, but the fact is that this is an isolated instance in the midst of many successfully completed sales by Chevrolet, Pontiac, and other General Motors car dealers to Nabcor.

Another statement of the same ilk is supposed to have been uttered by Mr. Douglas of the New York Chevrolet zone in 1969. It appears that for some reason Nabcor ordered two or three Chevrolets from a dealer in Cincinnati by the name of Queen City.

On inquiry about these, during some slight holdup, Mr. Douglas of the Chevrolet zone is supposed to have told Frank Maiorana that Nabcor was a bootlegger and there would be no delivery to bootleggers. However, the cars were delivered

in short order and the incidents have no particular substance.

I conclude that the evidence about these various incidents, starting with the conversations in November or December, 1966, taken along with all the other evidence, provides no basis for any jury finding of conspiratorial activity on the part of General Motors or GMAC. With respect to the Buffalo situation, where the claim involves not only General Motors but four defendant dealers and the defendant association, I conclude that there is insufficient evidence upon which a jury could make a finding of any conspiracy which caused any damage to plaintiffs.

I need to cover briefly a few other points. There is a claim in this case that in addition to the alleged refusal to sell, there were problems created by delays in delivery.

Plaintiffs' view apparently is that if the

proof is weak about the claim of refusal to deliver cars to Nabcor, the fall-back position is that there were delays in delivery which caused Nabcor some trouble.

Frank Maiorana testified that dealers should supply cars in 28 to 30 days. I think this testimony has to be viewed in the light of a publication put out by Nabcor as a training manual for its brokers, and in this publication, which is Exhibit 648, Nabcor stated to its brokers that the normal delivery of an automobile would take from four to six weeks.

The training manual went on to state that even this four-to-six-week delivery might not be able to be complied with because there are problems with the computer system, the ordering of parts and so forth, and the prospective Nabcor broker was warned there might be a two, three or even four-week delay beyond the four to six

weeks which was normal.

Mr. Maiorana never denied this, and his testimony as to what should happen doesn't really in any way rebut what is stated in the training manual as to what does happen.

Plaintiffs' counsel has supplied the Court with a list of all transactions where cars took more than 39 days to obtain from General Motors dealers. These situations can be dealt with briefly. A great many of them are about 40 or so days, 41 days, 42 days, 44 days; in other words, very, very close to the six weeks referred to in the training manual.

In any event, looking at the record of delivery times overall, the claimed delays were sporadic and there is simply no basis in the record for any possible finding that delays were caused by conspiratorial activity.

One other thing I should return to briefly

is this question about the allotments. There was a great deal of argument by Mahcor here and a great deal of evidence put on about the claim that the fleet allotment was not available to a dealer in connection with obtaining cars for resale to Mahcor.

I merely repeat what I said earlier, that there is no evidence that any specific car was either denied to Mahcor or was delayed in delivery to Mahcor because of any problem about allotments.

I discussed with plaintiffs' counsel during the argument the type of evidence which would be necessary to show support for such a contention, and I refer back to that without repeating it. There is simply no evidence of this kind.

Therefore, any claim about the so-called White List problem on the allocation problem or the fleet allotment problem or the fleet

certificate problem, is entirely academic as far as the actual facts of this case are concerned..

I should add a few points about damages. There is a contention that the activities of General Motors were such as to severely impair the business of Mahcor in late 1966 and early 1967, and that this was a direct causal factor leading to Mahcor's withdrawal from the automobile business. This is totally unrealistic, in view of the financial statements which show substantial amounts of sales of both automobiles and franchises for the fiscal years ending January 31, 1968, 1969, 1970 and 1971. Also, Mahcor stayed in the automobile business until the spring of 1973.

Damage theories have been proposed about loss of huge amounts of automobile and franchise sales. Without going into detail, I simply state that these theories involve projections which have no relation to reality.

With respect to an allegation that certain brokers terminated because of problems related to General Motors, I note that any attempt to develop the reason why a particular broker did little business, did no business, or terminated doing business, would require specific analysis and evidence with respect to the activities of that broker.

There has been no such analysis or evidence that could lead to the conclusion that any broker terminated on account of the activities of General Motors or the alleged conspiracy.

I note that in a list of prospective witnesses supplied to the Court and to defense counsel during the trial, relating to additional witnesses to be called, there was a group of some dozen witnesses who were franchisees or connected with franchisees.

None of them were called except the Donald

Bolling of General. So this line of proof simply was not developed at all.

Although this has been a very long statement and much longer than I intended, much more could be said. The fact is that as the case is analyzed, and I think analyzed by any objective person, the farther one gets, the deeper one gets, the more conclusive the proof is that there is simply no ground for recovery on the part of any of plaintiffs here, and that is the reason why I am dismissing the case.

I have dealt with Count 1 and Count 3 in my statement. The one thing I think still remains to be discussed, and I am sure it can be handled briefly, is that little bit of Count 17 which is left.

Can you refresh my memory and take care of that quickly?

MR. KAPLAN: Yes, your Honor. The fragment

of Count 17 that remains is the assertion by plaintiffs that General Motors had a financing plan available to leasing companies and that its unavailability to Nabcor violated the Robinson-Patman Act. In particular it makes the assertion that plaintiffs made application for financing under that plan which your Honor has discussed in your opinion and that it was denied.

Unless there needs to be further argument or a summary of the grounds we moved on --

THE COURT: That is dismissed.

MR. KAPLAN: Your Honor hasn't mentioned the claims of the individual plaintiffs. That is the only thing I can see. That hasn't been mentioned.

THE COURT: Well, I thought it was embraced --

MR. KAPLAN: It certainly is.

THE COURT: Now, I would add a word.

I think that General Motors clearly is right, that individual plaintiffs Frank Maiorana and Anthony Maiorana have no standing to assert their claims, but their claims should be dismissed for all the reasons I have heretofore advanced.

I want to mention very briefly that I assume that some form of judgment will be submitted embodying this, and that should be done quickly.

I think it is probably not appropriate at this point to get off the strict business and to get into any personal comments. I know it probably is cold comfort to Mr. Person for me to try to make any statement after I have dismissed his case, but I will say this, that the argument of the motions impressed me tremendously as far as the conduct of the lawyers and I have been concerned to some extent at different phases of the case with my belief that the claims of the plaintiffs were somewhat vague or there were now

claims being advanced and so forth.

But I wish to say to Mr. Person that his oral argument represented, in my view, a simply massive effort. If you said you stayed up all night -- I didn't agree -- I didn't agree with you and dismissed your case -- but you did pull this together in a way no one else could have done any better and made your points and made them clearly and you delineated your arguments clearly, and the result was that even if we disagree I understood what I was dealing with clearly and I very much appreciate that.

MR. PERSON: I think that there may have been certain things that have been said --

THE COURT: I will do all the talking at this point, we can't have rounds of this.

Also, it goes without saying that I was greatly assisted by the massive amount of work that the lawyers did during the trial on the

statistics and, of course, the lion's share was done by the Paul, Weiss firm, and I am immensely grateful and although I must say that I thought those specifications about the delays and all the other things that you gave me, Mr. Person, were very helpful.

I am just trying to say that this case has been a long one and we do have, I am sure -- we are all human beings and we have feelings beyond the strict business, and I want to express my appreciation to counsel for what they have done.

I would like to simply note, Mr. Person, that I would like very quickly to get organized on what to do with the other severed cases, and I think that I will try to have a conference and just get this organized and I think maybe we can do something in advance of those trials to get the type of material ready about the transactions and so forth, but I won't try to cover that.

APPENDIX A - BENCH DECISION OF DECEMBER 6, 1976 OF DISTRICT COURT, SOUTHERN DIST. N.Y. (GRIESA, J)

You could, if you can, alert counsel in the severed cases that I am going to expect them to come in and I know that as soon as you get a little rest I would appreciate your trying to think through what you think your position will be on those other cases, and we will talk again about them.

MR. PERSON: I think basically the Ford Motor Company is next and maybe that could be easy for all.

THE COURT: Thanks a lot.

MR. KLEINBARD: Your Honor, we may be excluded as members of the club at this point, and I just want to thank you for your courtesy and patience.

THE COURT: I will have the last word. You can't take it.

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APPENDIX B - FINAL JUDGMENT, FILED DECEMBER 16, 1976, OF DISTRICT COURT, SOUTHERN DIST. N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

NATIONAL AUTO BROKERS CORP., et al., : 70 Civ. 5421A (MPG)

Plaintiffs, :

-against- :

GENERAL MOTORS CORPORATION, et al., :

Defendants. :

- -x

FINAL JUDGMENT

This action having duly come on for trial as against defendants General Motors Corporation (sued herein in its own right and as Midtown Chevrolet, Inc.), General Motors Acceptance Corporation, Frederic G. Donner (sued herein as Frederick G. Donner), James M. Roche (sued herein as James P. Roche), Bob Bain Chevrolet, Paul Batt Buick, Inc., Glen Campbell Chevrolet, Inc., Gillogly Chevrolet, Inc. (sued herein as Hamister-Gillogly Chevrolet, Inc.), Niagara

APPENDIX B - FINAL JUDGMENT, FILED DECEMBER 16, 1976, OF DISTRICT COURT, SOUTHERN DIST. N.Y.

Frontier Automobile Dealers Association, Inc., and Paragon Oldsmobile, Inc., before the Honorable Thomas P. Griesa, District Judge, and a jury; all other defendants previously having been severed or dismissed from the action; the Court previously having granted partial summary judgment dismissing certain counts of the complaint, or parts thereof, as against defendant General Motors Corporation; this action previously having been discontinued with prejudice and without costs by plaintiffs Courtesy Auto Brokers and Robert B. Heim; the Court having directed a verdict dismissing all remaining counts of and claims asserted in the complaint as against all remaining defendants; and the Court having expressly determined that there is no just reason for delay in entering judgment upon the complaint, as all other defendants either have been dismissed or severed from this action, it is

APPENDIX B - FINAL JUDGMENT, FILED DECEMBER 16, 1976, OF DISTRICT COURT, SOUTHERN DIST. N.Y.

ORDERED, ADJUDGED AND DECREED that:

1. The complaint in this action be and it hereby is dismissed on the merits and with prejudice as against defendants General Motors Corporation (sued herein in its own right and as Midtown Chevrolet, Inc.), General Motors Acceptance Corporation, Frederic G. Donner (sued herein as Frederick G. Donner), James M. Roche (sued herein as James P. Roche), Bob Bain Chevrolet, Paul Batt Buick, Inc., Glen Campbell Chevrolet, Inc. (sued herein as Hamister-Gillogly Chevrolet, Inc.), Niagara Frontier Automobile Dealers Association, Inc. and Paragon Oldsmobile, Inc.;

2. The defendants named in paragraph 1 of this judgment recover their costs and disbursements, to be taxed by the clerk of this Court, against plaintiffs National Auto Brokers Corp., Frank Maiorana, Anthony Maiorana, General Auto Sales & Leasing, Inc.), Dale Strimple (suing herein as

APPENDIX B - FINAL JUDGMENT, FILED DECEMBER 16, 1976, OF DISTRICT COURT, SOUTHERN DIST. N.Y.

Dale Strimpel), Alfred J. Young, Sr., Nabcor of East New York, Inc., and Ralph Ajello, as administrator of the Estate of E. Louis Jarele, a/k/a Louis H. Jamele, jointly and severally; and

3. The Clerk is directed to make entry of this final judgment in accordance with Rules 54(b) and 58 of the Federal Rules of Civil Procedure.

/s/ THOMAS P. GRIESA
U.S.D.J.

JUDGMENT ENTERED - 12/16/76

/s/ RAYMOND F. BURGHARDT
Clerk of the Court

Dated: December 15, 1976
New York, New York

APPENDIX C - OPINION OF CIRCUIT JUDGE MANSFIELD OF THE SECOND CIRCUIT, DATED MARCH 20, 1978

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 160—September Term, 1977.

(Argued December 5, 1977 Decided March 20, 1978.)

Docket No. 77-7037

NATIONAL AUTO BROKERS CORP., FRANK MAIORANA, ANTHONY MAIORANA, GENERAL AUTO SALES & LEASING, INC., DALE STRIMPLE; RALPH AJELLO, as Administrator of the Estate of E. LOUIS JAMELE, Deceased; NABCOR OF EAST NEW YORK, INC., and ALFRED J. YOUNG, SR. d/b/a A.J. YOUNG, SR. AUTO SALES,

Plaintiffs-Appellants,

—against—

GENERAL MOTORS CORPORATION, FREDERIC G. DONNER, JAMES M. ROCHE, BOB BAIN CHEVROLET, PAUL BATT BUICK, INC., GLEN CAMPBELL CHEVROLET, INC., HAMISTER-GILLOGLY CHEVROLET, INC., PARAGON OLDSMOBILE, INC., NIAGARA FRONTIER AUTOMOBILE DEALERS ASSOCIATION, INC., and GENERAL MOTORS ACCEPTANCE CORPORATION,

Defendants-Appellees.

B e f o r e :

MOORE, SMITH* and MANSFIELD,

Circuit Judges.

* Judge Smith having requested that he be relieved of any consideration of this appeal, this decision is rendered solely by Judges Moore and Mansfield, who are in agreement, pursuant to the Rules of this Court, §0.14(b).

APPENDIX C - OPINION OF CIRCUIT JUDGE MANSFIELD OF THE SECOND CIRCUIT, DATED MARCH 20, 1978

Appeal from a decision of the United States District Court for the Southern District of New York, Thomas P. Griesa, *Judge*, directing a verdict for appellees on the grounds that appellants failed to present a prima facie case with regard to claims of a conspiracy to boycott and the maintenance of a "whitelist" in violation of the antitrust laws.

Affirmed.

CARL E. PERSON, Esq., New York, N.Y., *for Plaintiffs-Appellants.*

MARTIN KLEINBARD, Esq., LEWIS A. KAPLAN, Esq., New York, N.Y. (Moses Silverman, Esq., Howard S. Veisz, Esq., Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y., of counsel), *for Defendants-Appellees General Motors Corporation and General Motors Acceptance Corporation.*

ELLIS, KUSTELL & MULLENHOFF, Buffalo, N.Y. (Carl B. Kustell, Esq., Buffalo, N.Y., of counsel), *for Defendant-Appellee Bob Bain Chevrolet.*

BOBINS, HALPERN, SETEL, SNITZER, LEVY, YELLEN & FRADIN, P.C., Buffalo, N.Y. (Isadore Snitzer, Esq., Buffalo, N.Y., of counsel), *for Defendant-Appellee Glen Campbell Chevrolet, Inc.*

APPENDIX C - OPINION OF CIRCUIT JUDGE MANSFIELD OF THE SECOND CIRCUIT, DATED MARCH 20, 1978

WATSON, MCGARVEY, HETZELT & BENNETT, Buffalo, N.Y. (Joseph L. Watson, Esq., Buffalo, N.Y., of counsel), *for Defendants-Appellees Gillogly Chevrolet, Inc. and Niagara Frontier Automobile Dealers Association.*

LIPKIN & WEISBERG, New York, N.Y. (Sidney A. Weisberg, Esq., New York, N.Y., of counsel), *for Defendant-Appellee Paragon Oldsmobile, Inc.*

BRENNAN, TESSEYMAN, ZELMAN, RUNFOLA & BROWNSTEIN, Buffalo, N.Y. (Ross L. Runfola, Esq., Buffalo, N.Y., of counsel), *for Defendant-Appellee Paul Batt Buick, Inc.*

MANSFIELD, *Circuit Judge:*

This case demonstrates that unsound ideas cannot be turned into a profit through frivolous antitrust claims and costly litigation. National Auto Brokers Corporation (Nabcor) and several of its affiliates[1] appeal from a judgment of the Southern District of New York dismissing their antitrust suit for $3.6 billion against General Motors (GM) and others,[2] following a directed verdict at the close of the plaintiffs' case, which was tried for more than six weeks before Judge Thomas P. Griesa and a jury.

The action was commenced in 1970 against some 63 defendants, including GM and various other major auto manufacturers, banks, auto dealers, Better Business Bureaus, and individuals, by the filing of a 93-page complaint charging a conspiracy in violation of the antitrust laws,

including § 1 of the Sherman Act, to hamper Nabcor's efforts to obtain new automobiles for resale, and to restrain its competition in the sale of such cars.[3] As a result of serverances, this part of the case was tried only against GM and those defendants connected with or franchised by it. We have reviewed the lengthy trial record and agree with the court below that the plaintiffs failed completely to make out a prima facie case. Accordingly, we affirm the judgment of the district court, essentially for the reasons stated in Judge Griesa's thorough, well-reasoned opinion, 1976-2 Trade Cas. (CCH) ¶61,211. Because no purpose would be served by repeating his careful analysis of the evidence, we limit ourselves to a general outline with particular reference to the gross inadequacies in the proof which mandated dismissal.

The case arises out of the unsuccessful efforts of Nabcor, beginning in 1966, to compete with manufacturer-franchised automobile dealers in the sale of new cars by itself franchising individual "brokers" to sell cars to the public. The brokers were to solicit new car orders and forward them to Nabcor. Nabcor, headed by appellants Frank and Anthony Maiorana, was to provide administrative services and cars needed by the brokers to fill their orders.[4] The scheme was predicated on the theory that since the brokers would not be selling out of showrooms, maintaining inventories or providing repair services, their overhead would be low or virtually non-existent, enabling them to undercut manufacturer-franchised dealers and thus attract a large volume of retail purchasers. Nabcor planned to fill its brokers' orders by purchasing cars as needed from regular manufacturer-franchised dealers. It expected that the prospects of high volume would induce these dealers to

part with their cars at a small markup over their cost, which would enable Nabcor and its brokers to realize profits while undercutting the very dealers from whom the cars would be acquired.

The scheme proved a complete failure. Although Nabcor franchised approximately 145 brokers, from whom it received substantial cash payments, they failed to generate any significant number of new car orders. In four years the brokers submitted only 677 orders for GM cars. On December 10, 1970, this suit was instituted, seeking to shift the blame for appellants' failure to the defendants on antitrust law grounds.

Appellants first contend that beginning in 1966 GM conspired with its independent franchised dealers to impede Nabcor's efforts to obtain from the dealers GM cars for its brokers; the parties have referred to this aspect of the case as the "blacklist theory." Second, they assert that GM maintained an illegal "whitelist" under which it made quantities of cars—so-called "fleet allotments"—available to some favored high-volume customers (i.e., purchasers of 10, 20, or more cars for their own use, such as car leasing and rental companies) but not to Nabcor. The remaining individual appellants, the Maioranas and several brokers, seek damages allegedly resulting from the "blacklist" and "whitelist"—including compensation for their efforts in promoting Nabcor's operations and lost profits.

Upon this review, since the case is before us on appeal from a directed verdict, F.R.Civ.P. 50(a), all issues of credibility must be resolved in favor of appellants, *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943). At the same time, we need not overlook uncontradicted evidence unfavorable to appellants.

> "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury." *Epoch Producing Corp.* v. *Killiam Shows, Inc.*, 522 F.2d 737, 742-43 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976), quoting *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969).

Turning first to appellants' boycott claim, the record, which includes Nabcor's books, publications and the testimony of its president, reveals clearly that Nabcor received substantially all of the GM automobiles it ordered during the relevant period (from December 1966 to December 1970) and that it had no unusual difficulty in obtaining GM automobiles for delivery to its brokers. Of approximately 553 GM cars ordered by Nabcor from GM dealers during this period, from which some 81 may be deductible for cancellations and a certain Cadillac order claimed to have been placed in 1966, it received a minimum of 435 and a maximum of 503 cars. Indeed, during the last 3½ years of the relevant period it failed to receive only two GM vehicles, neither of which failure appears to be relied upon by appellants as proof of the alleged conspiracy.[5] Nabcor published a statement in 1969 and 1970 that it had "experienced no difficulty in supplying its brokers with automobiles, nor does it anticipate any difficulty in the future." Its president testified that if purchases from one GM dealer were terminated, it "could always get another dealer . . . could always get a source of supply if it were stopped at one particular place." Nabcor further represented in a 1968 publication that it was "not only welcomed by a majority of the rapidly growing auto-buying public but by manufacturers as well. . . ." Moreover, most GM-franchised dealers who were called as witnesses by Nabcor testified that they had not refused to sell GM cars to it. Although a few dealers had refused to do so, Nabcor was always able to obtain alternative sources of supply. The record reveals no substantial evidence, direct or circumstantial, that the refusals on the part of a few dealers to sell GM cars to Nabcor were directed, inspired, participated in, or approved by GM[6] or any of the other appellees.[7]

Turning to Nabcor's contention that GM refused to permit dealers to sell cars to Nabcor out of their fleet allotments, there likewise is no substantial supporting proof. Although the details of the "fleet allotment" system varied somewhat among GM's various divisions, each appears to have made an effort to allocate its production among the many independent GM dealers in order to assure that if shortages in new cars should ever develop, the supply would be spread equitably. With regard to sales to the general public, each GM dealer was assured access to a certain minimum number of cars for retail sales. At the same time, GM set aside some percentage of its production—the "fleet allotments"—for sale to large purchasers of cars for their own use (e.g., car rental companies). By securing a fleet allotment for a large order of cars, a dealer could avoid having to satisfy a bulk purchaser from stocks

earmarked for individual consumers.

Since Nabcor was purchasing cars for resale rather than for its own use, it may not have qualified for access to fleet allotments. But regardless of whether it qualified, the record is barren of any evidence that Nabcor was unable to obtain any GM cars because of any dealer's inability to secure a fleet allotment for it from GM or that Nabcor experienced any unusual patterns of delay in obtaining delivery of cars, much less that any delays were attributable to fleet allotment problems. Thus, GM's fleet allotments turned out to be immaterial, primarily because of the absence of any shortage in supply of GM automobiles.

After five weeks of trial and at a point when the inadequacy of the plaintiffs' proof was rapidly becoming apparent, plaintiffs orally moved for a mistrial and to disqualify Judge Griesa, who under the individual assignment system had by that time been in charge of the case for some four years. The ground asserted was that he should have recused himself because the large law firm of which he had been a member prior to his appointment in June, 1972 (Davis Polk & Wardwell) had represented General Motors in matters wholly unrelated to the subject matter of this case. The motion was denied on November 23, 1976, by Judge Griesa, who stated that except for working on an opinion letter involving GM, which had nothing even remotely to do with the litigation before him, he had never been involved in the representation of GM in any way. No affidavit in support of the motion, as required by 28 U.S.C. §144,[8] was filed until six days later. It alleged in addition that certain of Judge Griesa's rulings and statements had indicated bias.

On December 6, 1976, after hearing five days of oral

argument, Judge Griesa granted the defendants' motion for a directed verdict, rendering a lengthy oral opinion from the bench. Judgment dismissing the complaint as to appellees was entered on December 16, 1976.

Discussion

Turning first to appellants' claim that Judge Griesa should have disqualified himself, their motion and affidavit were not only untimely but insufficient. The prior representation of a party by a judge or his firm with regard to a matter unrelated to litigation before him does not automatically require recusal, 28 U.S.C. §455 (1970);[9] *Carr* v. *Fife*, 156 U.S. 494, 498 (1895); *Darlington* v. *Studebaker-Packard Corp.*, 261 F.2d 903, 906-07 (7th Cir.), *cert. denied*, 359 U.S. 922 (1959); see *Laird* v. *Tatum*, 409 U.S. 824 (1972) (Rehnquist, *J.*). Nothing about the Davis Polk firm's representation of GM in wholly unrelated matters suggests that Judge Griesa should have recused himself as a matter of discretion. Nor is there any indication that his actions on the bench in this case were the result of improper extra-judicial bias, *United States* v. *Haldeman*, 559 F.2d 31, 131-34 (D.C. Cir. 1976), *cert. denied*, —— U.S. —— (1977).

The mere filing of an affidavit of prejudice does not require a judge to recuse himself. On the contrary, we have held that a judge has an affirmative duty to inquire into the legal sufficiency of such an affidavit and not to disqualify himself unnecessarily, particularly "where the request for disqualification was not made at the threshold of the litigation and the judge has acquired a valuable background of experience." *Rosen* v. *Sugarman*, 357 F.2d 794, 797-98 (2d Cir. 1966). Here, the fact that Judge

Griesa's former membership in the Davis Polk firm had for years been a matter of public knowledge and that firm's representation of GM had been known to plaintiffs' counsel for months prior to trial. Under the circumstances Judge Griesa was duty bound to deny plaintiffs' frivolous motion for his disqualification.

Turning to the merits, in order to make out a prima facie *per se* violation of §1 of the Sherman Act, appellants assumed the burden of first introducing evidence from which a jury might reasonably infer that appellees had conspired to restrain sales to Nabcor, with resulting damage to it. See *United States* v. *General Motors*, 384 U.S. 127 (1966); *Klor's Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959). But there is an absence of any substantial evidence, direct or circumstantial, supporting these elements of appellants' claim. Appellants' own uncontradicted proof establishes that at all times, despite some refusals, there were many GM dealers willing to deal with Nabcor and that Nabcor was able to obtain from one dealer or another almost all of the GM cars it wanted. Moreover, there is no showing that it experienced delivery delays that were unusual in the automobile industry or indicative of a boycott or concerted refusal to deal. In light of these circumstances, the limited number of refusals by some dealers to fill Nabcor orders are insufficient to permit an inference of concerted action on the part of the appellees, the essential predicate of an antitrust conspiracy. See *Michelman* v. *Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042-43 (2d Cir. 1976), *cert. denied*, 429 U.S. 855 (1976) ("At a minimum, [defendants'] actions, to support a finding of conspiracy, must suggest a commitment to a common end."). There is simply no basis for inferring that these few refusals were the result of any agreement

or understanding with GM or other GM dealers, since the evidence is too consistent with independence of action to permit such an inference. On such a record a jury would not be entitled to find a conspiracy in violation of the antitrust laws.

Indeed, there were several good reasons why each dealer might have independently decided not to do business with Nabcor, as was the dealer's right, *United States* v. *Colgate*, 250 U.S. 900 (1919). In the first place, Nabcor was seeking to purchase cars at such a small markup over the dealer's cost that the dealer might well conclude independently that sales to Nabcor would not be worthwhile from the dealer's own standpoint. Secondly, the dealer might also independently conclude that since Nabcor's purpose was to undercut the dealer in selling to the public, sales by the dealer to Nabcor would adversely affect the dealer's own more profitable retail sales. There were sufficient grounds for concern over Nabcor's solvency, reputation and responsibility. Lastly, a dealer might become apprehensive that the respectability of the market for new GM cars would suffer in the public's eyes as a result of Nabcor's practice of selling GM cars without providing service. As we pointed out in *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102, 110 (2d Cir. 1975), discussing similar facts,

> "Such parallel conduct is consistent with independent competitive decisions or at most reflects a non-consensual decision not to compete. Additional facts or circumstances are needed to show that the decisions were interdependent and thus raise the inference of a tacit agreement to boycott."

By neglecting to present "additional facts or circumstances" tending to show that the actions of the GM dealers were interdependent or somehow concerted, appellants failed to raise their proof of a few individual refusals to deal to the level of a prima facie case of conspiracy.

The wide void in the circumstantial proof of conspiracy is not filled by the Maioranas' hearsay testimony regarding statements unfavorable to Nabcor that were attributed to GM employees. No GM employee is quoted as ever having admitted participation by GM in any conspiracy. Moreover, such unfavorable hearsay comments regarding Nabcor occurred when it was not having any difficulty obtaining all the GM cars it ordered. Nor is there any indication that the statements reflected the views of GM officials in a position to direct a boycott. Lastly, there is no evidence that the hearsay statements were implemented.

In short, appellants' proof of conspiracy was so utterly insubstantial as to preclude any jury from reasonably finding that any of the appellees had combined or agreed to prevent Nabcor from obtaining GM automobiles. Moreover, to the extent that appellants' case is based on a GM "whitelist" allotment theory it is defective for failure to show that the fleet allotment system violated the rule of reason, as required by the Supreme Court's recent decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, ——— U.S. ——, 97 Sup. Ct. 2549 (1977),[10] which held that such non-price vertical restraints are no longer *per se* illegal, thus overruling in this respect its earlier holding in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), upon which appellants relied below.[11] Consequently, it was appellants' burden, e.g., *Schwinn, supra*, 388 U.S. at 374 n.5; *Evans* v. *S.S. Kresge Co.*, 544 F.2d 1184, 1193-94 (3d

Cir. 1976), *cert. denied*, —— U.S. —— (1977), to show that GM's distribution system was unreasonable in view of "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). The record in this case is bare of facts enabling a jury to conclude that the GM system of allotments was unreasonable.

Thus appellants' claims were properly dismissed for failure to adduce evidence that would permit a jury to find a combination or conspiracy between any of the appellees, that appellants were injured by the alleged boycott or GM distribution system, or that the fleet allotment system was an unreasonable restraint in violation of the Sherman Act.

The decision of the court below is affirmed.[12]

Footnotes

1. In addition to Nabcor the appellants are (1) Frank Maiorana, its president and a principal shareholder; (2) Anthony Maiorana, vice president of Nabcor and a principal shareholder; (3) Alfred J. Young, Sr., a Nabcor broker; (4) Ralph Ajello, administrator of the estate of E. Louis Jamele, also a broker; and (5) Nabcor of East New York, Inc., a Nabcor "master broker." Dale Strimple and his corporation, General Auto Sales & Leasing, Inc., a master broker, have stipulated to the dismissal of their appeals. Given our disposition of this case, we need not decide which of the above parties have standing under §4 of the Clayton Act, 15 U.S.C. §15, to bring this action. See generally Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971).

APPENDIX C - OPINION OF CIRCUIT JUDGE MANSFIELD OF THE SECOND CIRCUIT, DATED MARCH 20, 1978

2. In addition to GM the appellees are (1) a subsidiary, General Motors Acceptance Corp.; (2) high-level GM officials Frederic G. Donner and James M. Roche; (3) a number of franchised GM dealers, Bob Bain Chevrolet, Paul Batt Buick, Inc., Glen Campbell Chevrolet, Inc., Hamister-Gillogly Chevrolet, Inc., and Paragon Oldsmobile, Inc.; and (4) an organization of dealers, the Niagara Frontier Automobile Dealers Association, Inc.

3. Originally, this suit was brought as a class action. Judge Griesa has since denied the suit class action status and has severed it into four parts. The subject of this appeal, the case involving the GM-related defendants, is the first of the four to go to trial.

4. When Nabcor first went into business, its system consisted of two levels -- Nabcor itself and its brokers. Later, however, Nabcor reorganized and began selling intermediate "master broker" and "area broker" franchises as well. Master brokers were assigned some of the responsibility for procuring cars. In order to simplify our discussion, we will not distinguish between Nabcor and its higher-level franchises unless the distinction is relevant to the issues being discussed.

5. Two key exhibits bearing on the boycott issues are PX 450, which attempts to trace Nabcor's orders based on its order log, and PX 699, which summarizes the alleged refusals to deal with Nabcor and problems with deliveries that Nabcor claimed were the result of a boycott. PX 699, which summarized the alleged refusals to deal with

Nabcor, indicates only two unexplained unfilled orders after June 1, 1967. It was during this later period that some GM employees allegedly made their hostile statements in the presence of the Maioranas.

Nabcor contended that in the fall of 1966 it received orders for forty-five 1967 Cadillacs, and placed forty-three of the orders with Colonial Cadillac of Trenton, N.J. Two witnesses from Colonial Cadillac denied any knowledge of the orders and its records show no such orders. Nabcor, moreover, had no record of any such orders.

6. Appellants introduced evidence showing that high-level GM management was made aware of the activities of Nabcor, but did not offer any competent evidence demonstrating that any action was taken by GM to persuade dealers to refrain from dealing with Nabcor.

7. Appellants presented some evidence that was admissible against some of the dealer appellees, but not against GM, with a view to showing that the dealers had conspired against Nabcor. Nevertheless, appellants did not present a prima facie case even against these appellees.

First, Frank Maiorana testified that officials of appellee Paragon Oldsmobile told him that GM employees had instructed Paragon not to sell to Nabcor. However, even if Paragon's acquiescence in such an order was sufficient to make the dealer a conspirator, there was no evidence that Nabcor was injured as a result; uncontradicted evidence indicates that it never had difficulty obtaining Oldsmobiles from some source.

Second, regarding the Buffalo area, representatives of a Nabcor master broker, General Auto Sales & Leasing Co., recounted hearsay statements

suggesting that GM personnel and dealers were communicating their hostility to the Nabcor system to one another. In addition, an organization of Buffalo-area dealers, then known as the Buffalo Automobile Dealers Association, distributed a bulletin describing Nabcor in unfavorable terms and implying that dealers should not get involved with it. But Nabcor's success in purchasing cars in the Buffalo area would have precluded any reasonable jury from finding liability based on a dealer conspiracy. Moreover, General Auto Sales & Leasing has stipulated to the dismissal of its appeal from the judgment below and the remaining appellants have failed to show any injury resulting from these events.

8. This section provides:

"Whenever a party to any proceeding in a district court makes and

files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is

made in good faith."

9. The provision applicable to this action provides:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

An amendment of §455 applicable to cases filed on December 5, 1974 or thereafter, see Act of Dec. 5, 1974, Pub. L. 93-512, §3 88 Stat. 1610, makes it clear that disqualification is not required unless "in private practice [the judge] served as lawyer in the matter in controversy, or a

lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter...." 28 U.S.C. §455(b)(2) (Supp. V, 1975) (emphasis added). Even under the more stringent requirements of the current statute, therefore, the prior representation of GM by Davis Polk and Judge Griesa as to unrelated matters would not require him to recuse himself.

10. Appellants attempt to characterize GM's allotment system as a restraint on resale prices. However, there was no evidence suggesting that this system was intended to control prices or that it had any such effect. To the contrary, it appears that GM dealers were free to set the prices of cars they purchased from GM.

11. Although Continental T.V., Inc., supra, was not decided by the Supreme Court until after the conclusion of trial of the present case, we are bound to apply its principles rather than the earlier per se rule of Schwinn. See Cort v. Ash, 422 U.S. 66, 74-77 (1975).

12. We have carefully considered appellants' contention that Judge Griesa improperly denied them answers to their so-called "communications interrogatories" and find it to be completely without merit.

APPENDIX D - ORDER OF SECOND CIRCUIT DATED AUGUST 29, 1978, DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of August, one thousand nine hundred and seventy-eight.

Present: HON. WALTER R. MANSFIELD
HON. J. JOSEPH SMITH
HON. LEONARD P. MOORE,

Circuit Judges.

NATIONAL AUTO BROKERS CORP., FRANK MAIORANA, ANTHONY MAIORANA, GENERAL AUTO SALES & LEASING INC., DALE STRIMPLE, RALPH AIELLO, etc. et al.,
Plaintiffs-Appellants
v. 77-7037
GENERAL MOTORS CORPORATION, FREDERIC G. DONNER, JAMES M. ROCHE, BOB BAIN CHEVROLET, PAUL BATT BUICK, INC., GLEN CAMPBELL CHEVROLET, INC., ET. AL.,
Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellants

APPENDIX D - ORDER OF SECOND CIRCUIT DATED AUGUST 29, 1978, DENYING PETITION FOR REHEARING

National Auto Brokers Corporation et. al.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ A. DANIEL FUSARO
A. DANIEL FUSARO, Clerk

APPENDIX E - ORDER OF SECOND CIRCUIT DATED AUGUST 29, 1978, DENYING PETITION FOR REHEARING IN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of August, one thousand nine hundred and seventy-eight.

NATIONAL AUTO BROKERS CORP., FRANK MAIORANA, ANTHONY MAIORANA, GENERAL AUTO SALES & LEASING, INC., et al.,
Plaintiffs-Appellants
v.
GENERAL MOTORS CORPORATION, FREDERIC G. DONNER, JAMES M. ROCHE, BOB BAIN CHEVROLET, PAUL BATT BUICK, INC., ET. AL.,
Defendants-Appellees.

77-7037

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants National Auto Brokers Corp. et al., and no active judge or judge who was a member

APPENDIX E - ORDER OF SECOND CIRCUIT DATED AUGUST 29, 1978, DENYING PETITION FOR REHEARING IN BANC

of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judge Smith took no part in consideration of the question whether to grant rehearing en banc.

/s/ IRVING R. KAUFMAN
Chief Judge
IRVING R. KAUFMAN

APPENDIX F - JUDGMENT OF SECOND CIRCUIT, DATED MARCH 20, 1978 AND DOCKETED OCTOBER 4, 1978, AFFIRMING JUDGMENT OF DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of March, one thousand nine hundred and seventy-eight.

Present: HON. LEONARD P. MOORE
HON. J. JOSEPH SMITH
HON. WALTER R. MANSFIELD,

Circuit Judges,

NATIONAL AUTO BROKERS CORP., FRANK MAIORANA : ANTHONY MAIORANA, GENERAL AUTO SALES & LEASING INC., DALE STRIPPLE; RALPH AJELLO, AS ADMINISTRATOR OF THE ESTATE OF E. LOUIS JANILE, DECEASED; NABCOR OF EAST NEW YORK, INC. and ALFRED J. YOUNG, SR. d/b/a A. J. YOUNG, SR. AUTO SALES,

Plaintiffs-Appellants,

77-7037

v.

GENERAL MOTORS CORPORATION, FREDERIC G. DONNER, JAMES M. ROCHE, BOB BAIN CHEVROLET, PAUL BATT: BUICK, INC., GLEN CAMPBELL CHEVROLET, INC., HAMISTER-GILLOGLY CHEVROLET, INC., PARAGON : OLDSMOBILE, INC., NIAGARA FRONTIER AUTOMOBILE DEALERS ASSOCIATION, INC. and GENERAL MOTORS : ACCEPTANCE CORPORATION,

Defendants-Appellees. :

APPENDIX F - JUDGMENT OF SECOND CIRCUIT, DATED MARCH 20, 1978 AND DOCKETED OCTOBER 4, 1978, AFFIRMING JUDGMENT OF DISTRICT COURT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. DANIEL FUSARO,
Clerk

By /s/ ARTHUR HELLER
Deputy Clerk

APPENDIX G - UNANSWERED LETTER OF OCTOBER 17, 1978 BY PETITIONERS' COUNSEL TO SECOND CIRCUIT JUDGES REQUESTING INFORMATION ABOUT DISQUALIFICATION OF MEMBER OF THREE-JUDGE PANEL

October 17, 1978

Hon. Irving R. Kaufman, Chief Judge
of the Second Circuit
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Hon. Walter R. Mansfield, Circuit Judge
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Hon. J. Joseph Smith, Circuit Judge
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Hon. Leonard P. Moore, Circuit Judge
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Re: National Auto Brokers Corp., et al.,
Plaintiffs-Appellants,
and
Courtesy Auto Brokers, et ano.,
Plaintiffs,
-against-
General Motors Corporation, et al.,
Defendants-Appellees,
77-7037

APPENDIX G - UNANSWERED LETTER OF OCTOBER 17, 1978 BY PETITIONERS' COUNSEL TO SECOND CIRCUIT JUDGES REQUESTING INFORMATION ABOUT DISQUALIFICATION OF MEMBER OF THREE-JUDGE PANEL

Honorable Sirs:

The appeal in the above action was argued before Judges Mansfield, Smith and Moore on December 6, 1977 and decided by written opinion dated March 20, 1978. A footnote, on page 1 of the opinion, stated that:

> "Judge Smith having requested that he be relieved of any consideration of this appeal, this decision is rendered solely by Judges Moore and Mansfield, who are in agreement, pursuant to the Rules of this Court, §0.14(b)."

A reporter from Automotive News (the leading industry publication) advised me that Judge Smith's secretary stated to him, in response to the reporter's inquiry shortly after publication of the panel's opinion, that the disqualification resulted from a question of stock ownership. Subsequently, I moved for reargument en banc, which motion was denied on August 29, 1978 by

APPENDIX G - UNANSWERED LETTER OF OCTOBER 17, 1978 BY PETITIONERS' COUNSEL TO SECOND CIRCUIT JUDGES REQUESTING INFORMATION ABOUT DISQUALIFICATION OF MEMBER OF THREE-JUDGE PANEL

Circuit Judges Mansfield and Moore and en banc (signed by Chief Judge Kaufman).

To assist the Supreme Court in deciding my planned petition for a writ of certiorari, would the Court please provide me with the following information:

1. The reason for Judge Smith's requested disqualification;
2. The date such basis occurred and/or first became evident to Judge Smith or any of the other members of the panel;
3. The date of Judge Smith's request to be relieved of any consideration of the appeal;
4. The date of grant of Judge Smith's request to be relieved;

APPENDIX G - UNANSWERED LETTER OF OCTOBER 17, 1978 BY PETITIONERS' COUNSEL TO SECOND CIRCUIT JUDGES REQUESTING INFORMATION ABOUT DISQUALIFICATION OF MEMBER OF THREE-JUDGE PANEL

5. The earliest date by which the 2- or 3-judge panel had decided the appeal in favor of the defendants-appellees;
6. Whether at any time prior to the initial decision any of the judges on the panel was disqualified to serve on the panel; and
7. Whether Judge Smith or any of his immediate family owned, directly or indirectly, securities issued by General Motors Corporation or any other party to the appeal or any part of the Nabcor Action:
   (a) at or before the date of argument of the appeal; or
   (b) at any time thereafter, up to the date of Judge's (sic) Smith's withdrawal from the panel.

APPENDIX G - UNANSWERED LETTER OF OCTOBER 17, 1978 BY PETITIONERS' COUNSEL TO SECOND CIRCUIT JUDGES REQUESTING INFORMATION ABOUT DISQUALIFICATION OF MEMBER OF THREE-JUDGE PANEL

I hope that this request is accepted not as any type of personal challenge to the Court or any of its members, but wholly in the spirit of advocacy on behalf of my clients, as to whom I believe a substantial injustice has occurred for reasons previously advanced. If I am excessive in my representation of them, I apologize and wish to be so informed; and I will adjust my advocacy accordingly.

Because of the obvious court-congestion problem, and resulting necessity for each judge to devote less time per case, the qualification or not of a judge to sit on a particular case becomes of far greater importance in our judicial system, especially when the actions of the trial-court judge are increasingly ratified by the over-worked appellate courts.

APPENDIX G - UNANSWERED LETTER OF OCTOBER 17, 1978 BY PETITIONERS' COUNSEL TO SECOND CIRCUIT JUDGES REQUESTING INFORMATION ABOUT DISQUALIFICATION OF MEMBER OF THREE-JUDGE PANEL

In this light, I respectfully request that the Court provide me with the information requested above.

I thank you in advance for your reply and understanding of my reasons for making this request.

Very truly yours,

/s/ CARL E. PERSON
Carl E. Person
Attorney for Plaintiffs-Appellants

CEP:hr

cc. Counsel for Defendants-Appellees

opposition

Supreme Court, U. S.
FILED
NOV 29 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-716

NATIONAL AUTO BROKERS CORP., *et al.*,
Petitioners,

—against—

GENERAL MOTORS CORPORATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF RESPONDENTS GENERAL MOTORS CORPORATION, GENERAL MOTORS ACCEPTANCE CORPORATION, FREDERIC G. DONNER AND JAMES M. ROCHE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-716

NATIONAL AUTO BROKERS CORP., *et al.*,

Petitioners,

—against—

GENERAL MOTORS CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF RESPONDENTS GENERAL MOTORS CORPORATION, GENERAL MOTORS ACCEPTANCE CORPORATION, FREDERIC G. DONNER AND JAMES M. ROCHE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The decision of the District Court granting defendants' motion for a directed verdict appears at pages 1a-94a of the appendix to the petition and is reported at 1976-2 TRADE CAS. (CCH) ¶ 61,211.

The decision of the Court of Appeals affirming the District Court appears at pages 99a-121a of the appendix to the petition and is reported at 572 F.2d 953.

The orders of the Court of Appeals denying rehearing and rehearing in banc appear at pages 122a-125a of the appendix to the petition.

Jurisdiction

Two of the six petitioners—General Auto Sales & Leasing, Inc. and Dale Strimple—consented to the dismissal of their appeal to the Second Circuit prior to that Court's decision below. (112a) In consequence, they are not parties in this case, and this Court therefore lacks jurisdiction to entertain a petition on their behalf. *See* 28 U.S.C. § 1254(1) (1976). Petitioners have so acknowledged. (Letter from petitioners' counsel to the Clerk of this Court, dated November 3, 1978.)

Questions Presented

1. Whether the district judge abused his discretion in declining to recuse himself on the ground that he once represented one of the litigants before him in a matter unrelated to this case.

2. Whether the court of appeals was bound to rehear this appeal because one of the three judges who heard oral argument withdrew from the case prior to the court's decision where the two remaining judges agreed on the disposition of the appeal.

3. Whether there was sufficient evidence at trial to withstand defendants' motion for a directed verdict.

Statutes and Rules Involved

This case involves the following statutes and rules, in addition to those quoted in the petition:

28 U.S.C. § 46 (1976), which provides in part:

> "(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.
>
> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. . . .
>
> "(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

Rule 47, Fed. R. Ap. P., which provides in part:

> "Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules."

Counterstatement of the Case

This is an antitrust action in which plaintiffs sought $3.6 billion in damages. The principal charge was that defendants and others conspired to refuse to sell new automobiles to plaintiffs. (3a-4a, 101a-102a)

The extensive pretrial proceedings lasted for nearly six years. Plaintiffs conducted 44 depositions, reviewed thousands of documents, received answers to numerous interrogatories and litigated many motions.

At trial, plaintiffs' case evaporated in the face of uncontroverted evidence and their own admissions, which established beyond dispute that plaintiffs obtained virtually all of the automobiles they ordered and that, where isolated problems in obtaining automobiles were alleged to have occurred, they were not of defendants' making. (28a-73a, 104a-105a)

After five weeks of trial, at a time when the defects in plaintiffs' case were evident, plaintiffs' counsel orally moved for a mistrial and to disqualify the trial judge because the law firm of which the judge had been a member some years before had represented defendant General Motors ("GM") in matters unrelated to this case. The trial judge denied the motion, stating that, except for working on an opinion letter for GM which had nothing remotely to do with this case, he had never been involved with the representation of GM in any way. Plaintiffs subsequently filed an affidavit seeking the judge's disqualification on the ground, among others, that the judge's statements and rulings in this case indicated bias. (106a)

At the close of plaintiffs' case, the trial judge heard oral argument on defendants' motions for a directed verdict. After reviewing detailed computer analyses in evidence with respect to plaintiffs' new car orders and all of the other evidence relating to plaintiffs' few specific alleged difficulties, the trial judge granted defendants' motions and dismissed the case, holding that there was no evidence of the alleged conspiracy or of injury or damages to plaintiffs. (101a-102a, 106a-107a; *see* 1a-94a)

The Second Circuit reviewed the lengthy record and affirmed the judgment below in an opinion by Judge Mansfield. (102a) After examining the facts concerning the trial judge's former representation of General Motors and his alleged bias, the Second Circuit held that the trial judge "was duty bound to deny plaintiffs' frivolous motion for his disqualification," stating:

> "The prior representation of a party by a judge or his firm with regard to a matter unrelated to litigation before him does not automatically require recusal, 28 U.S.C. § 455 (1970); [footnote and citations omitted]. Nothing about the . . . representation of GM [by District Judge Griesa's former firm] in wholly unrelated matters suggests that Judge Griesa should have recused himself as a matter of discretion." (107a; *see* 106a-108a)

The court found also that plaintiffs' motion was untimely. (107a)

Before the Second Circuit reached its decision, one of the three judges who heard oral argument asked to be relieved of consideration of the appeal. In accordance with 2d Cir. R. § 0.14(b) (pet. at 10-11), the decision was rendered by the remaining two judges, who were in agreement. (99a) Plaintiffs sought rehearing in banc, asserting that the panel which heard their appeal was disqualified because one of the judges removed himself from the case after argument. The petition was denied without dissent. (124a-125a; *see* 122a-123a)

I

Petitioners' Disqualification Motion Raises No Issue Worthy of Review.

Petitioners' disqualification motion raises no issue worthy of review by this Court for the following reasons:

1. The Second Circuit's decision is fully consistent with decisions of this Court and all circuit courts which have addressed the issues.

It has long been established that a judge's prior representation of a litigant appearing before him in an unrelated matter does not require the judge to disqualify himself. *Carr* v. *Fife,* 156 U.S. 494, 498 (1895); *Laird* v. *Tatum,* 409 U.S. 824 (1972) (Rehnquist, J., in chambers); *Darlington* v. *Studebaker-Packard Corp.,* 261 F.2d 903, 906-07 (7th Cir.), *cert. denied,* 359 U.S. 992 (1959); *Simmons* v. *United States,* 89 F.2d 591, 592-93 (5th Cir.), *cert. denied,* 302 U.S. 700 (1937) (107a).[1]

2. The statute governing this action requires disqualification only in a case in which the judge "has been of counsel" or is "so related to or connected with any party . . . as to render it improper, *in his opinion,* for him to sit . . . ." 28 U.S.C. § 455 (1970), *amended,* 28 U.S.C. § 455 (1976) (emphasis added) (107a, 119a-120a).[2] The relevant version of Section 455 thus leaves the question of recusal to the district judge, and the standard of appellate review is

[1] The petition seeks to convey the impression that the trial judge or his former firm represented GM in litigation related to this case. (Pet. at 49-51) There is no basis for this suggestion.

[2] The amended version of 28 U.S.C. § 455 applies only to actions, unlike this one, filed on or after December 5, 1974. Even under the amended statute, the trial judge would not have been required to recuse himself. *See* note 3, *infra.*

whether the judge abused his discretion. *E.g., United States* v. *Haldeman,* 559 F.2d 31, 139 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977); *Weiss* v. *Hunna,* 312 F.2d 711, 714 (2d Cir.), *cert. denied,* 374 U.S. 853 (1963) (Friendly, J.). This Court should not grant certiorari to review the trial judge's exercise of discretion.

3. Section 455 of the Judicial Code, which pertains to the disqualification of judges, was amended in 1974. All actions brought on or after December 5, 1974 are governed by the amended statute, while this and all other actions commenced prior to December 5, 1974 are governed by the former statute. Act of Dec. 5, 1974, Pub. L. 93-512, § 3, 88 Stat. 1610 (119a-120a). This Court should not grant certiorari to construe the old statute, as its proper interpretation is now, or soon will be, unimportant in light of the 1974 amendment.[3]

4. The Second Circuit's determination that petitioners' motion was untimely was correct and presents no issue worthy of review.

Section 144 of the Judicial Code provides that a motion to disqualify a district judge must be made by an affidavit which

> "shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. . . ." 28 U.S.C. § 144 (1976).

[3] As the Second Circuit noted, the trial judge would not have been required to disqualify himself in this case even under the amended statute, which was designed to broaden the grounds for disqualification. The amended statute provides that disqualification is not required unless "in private practice [the judge] served as lawyer *in the matter in controversy,* or a lawyer with whom he previously practiced law served during such association as a lawyer *concerning the matter* . . . ." 28 U.S.C. § 455(b)(2) (1976) (emphasis added) (119a-120a). Neither the judge nor his former firm represented GM in this case, "the matter in controversy".

The district judge presided over this case for four years prior to trial. Petitioners knew of his former firm's prior representation of GM for months before trial, and the judge's prior membership in the firm was a matter of public knowledge. Yet petitioners did not make their motion and file their affidavit until the end of the trial, after it was clear that they would lose their case.[4] (106a-108a)

5. Even if the trial judge should have disqualified himself, his failure to do so was harmless.

The sole issue on appeal, apart from the disqualification question, was whether the evidence at trial was sufficient to withstand defendants' motions for a directed verdict.[5] This was a question of law as to which the trial judge had no discretion. The Second Circuit reviewed the record and agreed with the trial judge that petitioners "failed completely to make out a prima facie case." (102a) Petitioners did not contest on appeal any evidentiary rulings at trial, and the content of the record on which the Second Circuit acted was not affected by the identity of the district judge.

In these circumstances, the refusal of the trial judge to disqualify himself could not have affected petitioners adversely, and the outcome of this action would be unchanged by any ruling this Court might make on the disqualification issue. Accordingly, this Court should not grant certiorari,

[4] The petition accuses respondents of withholding a document from production in order to hide the relationship between the trial judge and GM. (Pet. at 19, 50) This assertion is untrue and unsupported by the record.

[5] Brief for plaintiffs-appellants at 1-2, 63-65, *National Auto Brokers Corp.* v. *General Motors Corp., supra,* 572 F.2d 953.

for a decision on this issue in substance would be an advisory opinion.[6]

II

Petitioners' Request for Rehearing Before the Second Circuit Raises No Issue Worthy of Review.

Following argument in the Court of Appeals, Judge Smith withdrew from the panel. The Second Circuit's decision was rendered by the other two judges, Judges Mansfield and Moore, who were in agreement, pursuant to Section 0.14(b) of the Second Circuit Rules, which provides in relevant part:

> "If a judge of a panel of the Court which has heard argument or taken under submission any appeal . . . shall be relieved of . . . consideration at his request, the two remaining judges will determine the matter if they are in agreement and neither requests the designation of a third judge. . . ." (*See* pet. at 10-11)

Petitioners claim a right to have the case reheard by a new three-judge panel as a result of Judge Smith's withdrawal. They do so despite the fact that the Second Circuit unanimously denied their petition for rehearing in banc, which was based in part on this contention, and despite the

[6] We have not addressed petitioners' contention that the trial judge's comments and rulings evidenced bias against them (pet. at 22-28), as the petition does not seek review of that question (pet. at 4-5) and petitioners are limited to the questions presented in the petition. Sup. Ct. R. 23(1)(c); *accord, e.g., General Talking Pictures Corp.* v. *Western Elec. Co.*, 304 U.S. 175, 177-78 (1938). Even if the point were properly before the Court, it raises no issue worthy of review. The decision below was based upon and consistent with this Court's holdings that a trial judge's comments and rulings in a case before him are not grounds for disqualification where, as here, they do not arise from an extrajudicial bias. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 43-44 (1913) (107a).

fact that Judges Mansfield and Moore, who decided the appeal, both agreed with the trial judge that "gross inadequacies" in petitioners' proof "mandated dismissal." (102a)

Section 0.14(b) of the Second Circuit Rules is authorized by Rule 47, Fed. R. Ap. P., and is fully consistent with 28 U.S.C. § 46 (1976), which provides that cases before courts of appeals "shall be heard and determined by a court or division of not more than three judges" and that "[a] majority of the number of judges authorized to constitute a court or division thereof . . . shall constitute a quorum." 28 U.S.C. §§ 46(c), (d) (1976). This Court has explained that: "Two judges of a three-judge circuit court of appeals . . . ordinarily constitute a statutory quorum for the hearing and determination of cases." *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, 138 (1947) (footnotes omitted); *see FTC* v. *Flotill Products, Inc.*, 389 U.S. 179, 184-85 n. 7 (1967); *Tobin* v. *Ramey*, 206 F.2d 505, 507 (5th Cir. 1953).

Moreover, the Second Circuit's rule is sound as a matter of policy. If an appellate judge removes himself after oral argument and the two remaining judges agree on the disposition of the appeal, a rehearing is unnecessary. For this reason, circuit courts routinely permit two judges to decide an appeal in such circumstances.[7]

Petitioners' attack on the Second Circuit Rule, which embodies an appropriate and sensible practice, raises no issue worthy of review.

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[7] *See, e.g., Sledge* v. *J. P. Stevens & Co.*, 18 E.P.D. (CCH) ¶ 8657, at 4593 (4th Cir. 1978) (Judge Craven died before decision); *Pickett* v. *Milam*, 579 F.2d 1118, 1119 (8th Cir. 1978) (Judge Webster did not participate in decision, apparently because of his resignation to become FBI director); *Makofsky* v. *Cunningham*, 576 F.2d 1223, 1226 (5th Cir. 1978) (Judge Wisdom recused himself without

(footnote continued on following page)

III

This Court Should Not Grant Certiorari to Review the Sufficiency of the Evidence.

Petitioners ask this court to review the record of a six-week trial to determine whether the district court and the court of appeals both erred in holding that there was insufficient evidence to withstand defendants' motion for a directed verdict. (Pet. at 59) This Court has held that this is not a proper reason to grant certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

IV

This Case Is Not a Suitable Vehicle for Review of Any Issue by This Court.

This is a particularly inappropriate case in which to grant certiorari because, as we believe is clear from the petition, this is not a case in which the Court may rely on petitioners to present a clear, concise and accurate picture of the evidence and issues below. The petition frequently goes beyond and makes assertions unsupported by the record.

(footnote continued from preceding page)

explanation); *United States* v. *Beasley*, 563 F.2d 1225, 1226 (5th Cir. 1977) (Judge Rives could not participate in decision because of illness); *United States* v. *Mitchell*, 556 F.2d 371, 373 (6th Cir.), *cert. denied*, 434 U.S. 925 (1977) (Judge McCree resigned prior to decision); *United States* v. *Galvan*, 542 F.2d 531 (9th Cir. 1976) (Judge Carr died prior to decision); *Peters* v. *Jefferson Chemical Co.*, 516 F.2d 447, 448 (5th Cir. 1975) (Judge Goldberg disqualified himself after learning of the corporate affiliation of one of the parties); *United States* v. *Zarzour*, 432 F.2d 1, 2 (5th Cir. 1970) (Judge Morgan recused himself because he participated as a district judge in phases of the original trial).

CONCLUSION

The Second Circuit began its opinion by stating:

> "This case demonstrates that unsound ideas cannot be turned into a profit through frivolous antitrust claims and costly litigation." (101a)

While petitioners have not profited in the courts from their unsound ideas, their frivolous antitrust claims have put respondents and the courts to a tremendous burden.

Petitioners brought this lawsuit nearly eight years ago. The case has consumed untold hours of courts, counsel and litigants. We most respectfully submit that the time has come to put the *quietus* to petitioners' costly imposition on the courts and on respondents.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 30, 1978

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-716

NATIONAL AUTO BROKERS CORP., et al.,

Petitioners,

-against-

GENERAL MOTORS CORPORATION, et al.,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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December 4, 1978

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-716

NATIONAL AUTO BROKERS CORP., et al.,

Petitioners,

-against-

GENERAL MOTORS CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This reply by petitioners, under subparagraph 4 of Rule 24 of the Rules of the Supreme Court, is addressed to arguments first raised in the brief in opposition.

I.

THE REPRESENTATION BY THE DISTRICT JUDGE AND HIS LAW FIRM WAS "RELATED" TO THIS CASE

Respondents try to limit petitioners' first question to the district judge's representation of the GM Defendants "in a matter unrelated to this case" (p. 2, and note 1 at p. 6, Resp. Br.). Petitioners' first question clearly assumes that representation of GM, GMAC and a top GM management committee by the district judge and his law firm in the antitrust and Dealer-Day-in-Court Act areas was, in fact, representation by the judge and his law firm in a "related" or "connected" matter.

A most important sub-issue is whether contemporaneous antitrust litigation and representation for an organization (at least in one line of its business) is related to antitrust litigation brought against such organiza-

tion by any plaintiff (at least as to such line of business). The answer, for reasons set forth below, is clearly in the affirmative.

"Related Matters" or
"Connected Matters"

Respondents cite 4 cases for their proposition that the judge should have disqualified himself only if the present case was a "related matter" (p. 6, ¶ 1, Resp. Br.), but fail to discuss what constitutes a "related" or "connected" matter. The standard is set forth in Carr v. Fife, 156 U.S. 494, 498 (1895) as "matters not connected with the present case".

Petitioners urge that this Court elaborate upon such vague standard, to guide the courts and bar, by defining "related matter" or "connected matter" for purposes of application or not of 28 U.S.C. §§ 144, 455 (1970) and 455 (1976) to

consist of or include the following matters or involvements ("proposed standards"):

1. if a judgment in one matter would require application of the doctrine of res judicata in the other;

2. if a judgment in one matter could have involved application of the doctrine of collateral estoppel in the other;

3. if the information which the judge or his firm obtained by reason of the prior representation would permit the judge or any of his partners or associates to be a fact witness in the present case, but for the attorney-client privilege;

4. if, through the prior representation, the judge or his firm has knowledge

of any part of the facts in dispute or what reasonably might be admissible evidence in the present action;

5. if the judge or his firm represented the party as to similar types of issues or litigation and it would be reasonable to anticipate that either would be familiar with all or part of such party's (i) evidence; (ii) expert witnesses; (iii) litigation strategy; or (iv) documents which might reasonably be called upon for production by the opposing party relevant to the present case (e.g., tire blow-out cases for a tire manufacturing company, or "Pinto" cases involving gas tank explosions upon rear-end collisions);

6. for period of the applicable limiting period under state law (3 years, § 214,

subd. 6, New York CPLR) after leaving the firm or discontinuance of related representation, if the judge could be liable for any possible malpractice of his law firm for rendered legal advice to such party which could be in conflict with any of the decisions which reasonably could be made by the judge in the present case; or

7. for a reasonable period of time, say 3 years, after the judge is appointed to the bench, if his firm continues to represent the party, to permit payouts to the judge and economic disentanglement by the judge from his former law partnership (e.g., to permit resolution of any claims against the firm for which the judge as former partner would be personally liable (in the event of non-payment by the firm) and to permit

orderly repurchase of the judge's interest in the firm).

Each of the foregoing proposed standards (except Nos 1 and 7) would have disqualified Judge Griesa from handling the present antitrust case against the GM Defendants. If, on the other hand, the judge's law firm had represented GM solely in tire blow-out cases, only proposed standard No. 7 above would have disqualified the judge (inasmuch as the judge was assigned this action as soon as he became a judge), because of the judge's presumed continuing financial interest in the firm.

Application of some parts of the foregoing proposed standards in elaboration of "related matters" and "connected matters" is discussed below.

Knowledge of Admissible Evidence

Violations of the antitrust statutes by the GM Defendants would have been admissible evidence for petitioners in this action, brought under §§ 1-3 of the Sherman Act. E.g., Rule 404(b), F.R.E., evidence of crimes to prove intent to violate the antitrust laws; and Rule 406, F.R.E., evidence relating to routine pratices of an organization, to show wilful interference with other new-car "brokers". Thus, the judge had actual or constructive information of a confidential nature (attorney-client privilege) about GM's actual or possible violations of the antitrust laws. As to such information, the judge was being called upon by petitioners to order the GM Defendants to disclose the information to petitioners (the judge ruling against petitioners in most or all of such requests). Also, the judge had the duty to hear and determine these matters as to which

he had actual or constructive information of a confidential nature. How he did this in fairness to all of the parties is unknown to petitioners, and could not be even guessed at by reasonable persons, who would conclude there was something improper and unworkable about any such arrangement. Did the judge decide issues of fact against petitioners (such as his denial of petitioners' preliminary injunction motion or grant of respondents' motion for a directed verdict) through his exposure to the confidential information obtained from GM? Did he refuse discovery to petitioners as to other antitrust violations so he would not have to review matters which had been passed on by his firm or as to which he, or members of his firm, could have been a witness, if known to petitioners? To what extent did his continuing professional obligation to GM not to disclose information obtained by him or the firm from GM make him unable to objectively look at issues of anti-

trust violations raised by petitioners, the petitioners' discovery requests, preliminary injunction motion, petitioners' trial subpoenaes, damage claims, admissibility of the permanent injunction against GM in the California case or otherwise?

GM's activities in actual or possible violation of the antitrust laws are related issues (and representation by the judge's firm is representation in "related" or "connected" matters) regardless of the plaintiff who is suing. The related matter is GM's activities. Plaintiffs' own damages caused by such GM activities are less "related", although they could still be related under proposed standard 5 and even 2, 3 and 4 above.

Accordingly, the judge should have disqualified himself under proposed standards 2-5 above.

Application of Doctrine
of Collateral Estoppel

Representation of GM in antitrust litigation would necessarily involve the representation of GM in matters in which the outcome of such cases could, or could not be, admissible as evidence in support of petitioners' antitrust (Sherman Act) claims depending on the outcome of the original litigation (also as to petitioners' Robinson-Patman Act claims), depending on the outcome of the original litigation, based on evidence seen by or known to the judge or his firm, and not by petitioners herein or their counsel.

Liability of the Judge
for Malpractice of Firm

The judge had liability as a firm partner for any professional malpractice of such firm to GM in the antitrust area, committed prior to his departure from the firm (a few days before he was assigned this case for all purposes).

It is possible that such malpractice liability against the firm could have been established if the judge had ruled in this action that any part of the GM new-car distribution system violated any of the antitrust laws (fleet allotments, fleet certificates, discriminatory pricing, retail allotments).

Accordingly, the judge should have determined this action was a "related" or "connected" matter to his firm's prior and continuing antitrust representation of GM and disqualified himself at the outset and when repeatedly requested to do so under proposed standard 6 above.

Dealer-Day-in-Court Act
Representation of GM
Is Also a Related Matter

Even the GM litigation by the judge's firm under the Dealers-Day-in-Court Act was a "related" or "connected" matter, the judge's

law firm having represented GM against charges that GM was improperly threatening to take away the dealer's franchise. In this action by petitioners, they alleged that GM was illegally threatening GM dealers with loss of their franchises if they sold cars to Nabcor (a continuation of the business practices alleged in the suits under the Dealer-Day-in-Court Act against GM); also, petitioners were attempting to represent all GM dealers as a class against GM (as to various Robinson-Patman claims, particularly that leasing was the equivalent of sale in many situations).

II.

NEITHER PETITIONERS NOR THEIR ATTORNEY KNEW BEFORE TRIAL OF THE FIRM'S RECENT ANTITRUST REPRESENTATION OF GM

Petitioners made their oral recusal motion at the outset of the 1st trial day after petitioners' counsel learned (on the preceding

day off from trial) that the judge's firm represented GM at the time the judge was appointed to the bench and this case. The judge stated during the proceeding that he had personally worked on a GM or GMAC matter, and denied motion. Petitioners' attorney then researched, prepared, obtained execution of and filed an affidavit of prejudice, only 2 trial days thereafter (while continuing the massive antitrust trial single-handedly), based on the same information plus the disclosures made by the judge and respondents' attorneys.

Petitioners' counsel (as distinguished from any of the petitioners) knew months before the trial that 23 years prior to the trial the judge's law firm had represented GM in a major antitrust suit, but about 10 years or more before the trial in this present action believed, reasonably, that all of such legal representation

had gone to respondents' attorneys (at least as early as the 1960's Nader-GM problem). None of the petitioners was aware of this relationship until the day the affidavit of prejudice was executed and filed, because the representation 23 years before was not considered important by petitioners' counsel, until he learned from an associate of the firm that the judge's firm continued to represent GM up to and beyond the time when the judge became a judge and was assigned this case. Burpus v. Uniroyal Tire Co., Division of Uniroyal, Inc., 385 F.Supp. 711 (E.D.Pa. 1974) held that a 10-year period was too long to require disqualification of the judge, a former partner of the firm.

III.

FAILURE OF THE TRIAL JUDGE TO DISQUALIFY HIMSELF WAS HARMFUL

If the judge was disqualified and had disqualified himself when requested to do so, petitioners' case could have been quite different from its present posture (according to respondents' arguments about alleged insufficiency of evidence). This assumes that the judge would have declared a mistrial, removed himself, a new judge would have been appointed, and petitioners would have been allowed to develop their whole case before the qualified judge during pre-trial proceedings and trial.

Each denial of petitioners' repeated discovery efforts, each decision by the judge on the admissibility or not of offered evidence, termination of the trial without permitting plaintiffs to call GM as a witness or without

requiring respondents to put on their case — these and other decisions by the disqualified judge could have materially affected the outcome of the case, even assuming respondents' argument that petitioners had insufficient evidence by the end of the trial proceedings before the disqualified judge.

Respondents even argue that whether or not petitioners had a case is irrelevant, because the Supreme Court does not review such matters. This is a strong argument for this Court to grant certiorari, to review the disqualification issues, because petitioners have no other remedy for the damage done (or which appears to have been done) to their case by the disqualified judge. As a practical matter, litigants have to live with most, if not all, of the rulings the courts below have made, and petitioners' only practical remedy under such circumstances is to show that the judge should

not have made any of such rulings, because of his actual disqualification throughout the entire period of pre-trial proceedings and trial, and his failure to remove himself when requested to do so.

The difficulty in proving what evidence a party was not permitted to obtain by adverse rulings of a disqualified judge makes respondents' argument illogical and frivolous. If the judge should have disqualified himself, petitioners should have the opportunity to develop their case before a judge not so disqualified, which will result in a different record, based upon different pre-trial decisions by the court and different litigation emphases and strategies by counsel. The needless expenditure of time and money by petitioners and their counsel trying to overcome the adverse rulings and anticipated adverse rulings by the disqualified judge prevented petitioners from

seeking needed evidence in other ways. Petitioners were damaged, therefore, by a diversion of their time and money seeking to obtain evidence and having to provide discovery under adverse rulings by a disqualified judge, without being aware of the judge's disqualification.

It is of utmost importance to the judicial system that parties be entitled to make legitimate use of the federal recusal statutes, to prohibit further damage to their cause by a judge who is disqualified to serve through the reasonable appearance of impropriety (the federal standard rather than any showing of actual impropriety).

To say that an appearance of impropriety is meaningless (Respondents' Br., p. 8, ¶ 5) because the disqualified judge has ruled that the party had no evidence anyway

is wholly circuitous and unworthy of GM and counsel to make before this or any other Court.

Virtually any reasonable man would say, under the circumstances of this case, that the district judge should have recused himself (a) because he was in fact biased against petitioners and their counsel; and (b) because he would have appeared to reasonable persons to be prejudiced — both for extrinsic or extra-judicial reasons (the prior representation of GM in "related" or "connected" matters, as defined above by proposed standards 1-7; i.e., the prior and concurrent antitrust representation of GM by the judge's firm). Yet, the judge himself and a Second Circuit panel (having similar disqualification problems, relating to ownership of GM stock) found themselves unable to arrive at this obvious and necessary conclusion.

One wonders about the extent to which the district and appellate judges are following the standards required under the federal recusal statutes, and expected of them by reasonable persons. It is possible that since the present case is the only case of its type (any kind of representation which clearly should have been held to be a "related" or "connected" matter under the proposed standards 1-7 above) that all other federal judges have recused themselves under such circumstances, and that Judge Griesa (and the Second Circuit in this case) have construed the law erroneously.

This Court should grant petitioner's request and take the opportunity to state its position on this most important issue in the fair administration of our federal justice system.

Also, it should be noted, that based upon the Second Circuit's opinion in this severed action (called the "A" action), Judge Griesa has refused to recuse himself under 28 U.S.C. §§ 144 and 455 in each of the other 3 severed actions ("B", "C" and "D" actions) constituting the remainder of the original Nabcor Action, as well as one other action commenced by Nabcor against 1 original defendant and 2 new defendants. The the issues in the petition are important as to at least 4 additional cases, and should be resolved by this Court.

IV.

RESPONDENTS WITHHELD A DOCUMENT AND THEREBY HID FROM PETITIONERS' ATTORNEY THE REPRESENTATION OF GM BY THE JUDGE'S LAW FIRM

As soon as petitioners' attorney made his oral recusal motion, one of respondents' attorneys told the judge (falsely) that during pre-trial proceedings he had delivered a document

to petitioners' attorney which disclosed on its face that GM was represented by the judge's firm. The attorney did not say whether this occurred before or after the judge was appointed to the bench and this case.

Petitioners immediately (and truthfully) denied that any such document was ever produced or shown to petitioners' attorney, and demanded once in the District Court and twice in the Second Circuit that respondents' attorneys produce such document, but no document or explanation was forthcoming. All of this is in the record.

The district judge said, at the time, that he thought the issue of his disqualification had been raised by someone already in this action; but this was not by petitioners or their counsel, or within their presence or to their knowledge, as the record shows.

The record does reflect an ex parte communication between the district judge and four GM attorneys, on the eve of trial, at the judge's request (subject-matter unknown).

V.

PETITIONERS RAISE THE ISSUE OF ACTUAL BIAS OF THE DISTRICT JUDGE

Petitioners' first question states "whether biased or not". By this, petitioners included both issues of petitioners' entitlement to grant of the recusal motions

(1) whether in fact the judge was biased, and

(2) even if the judge was not actually biased.

Clearly, petitioners' lengthy quotations from the record show actual bias and should have led GM's counsel to the conclusion, but they decided to avoid the issue in this Court by falsely claiming that no such issue was raised.

Also, the petition states: "Throughout the trial, Judge Griesa displayed an obvious bias against plaintiffs and their counsel, saying...." (p. 22, Pet.) Petitioners argue that the bias arose from the extra-judicial circumstances of the judge's relationship, immediately before his appointment to the bench and this case, with GM, GMAC, the top GM or GMAC management committee, the judge's law firm (representing GM) and the "related" or "connected" (antitrust) matters in which the firm was representing GM, prior to and at the time the judge was appointed to the bench and was assigned this case for all purposes.

VI.

RESPONDENTS' BRIEF SHOULD BE DISREGARDED FOR LACK OF CANDOR

Respondents' brief is typical of their litigation tactics in this action, e.g., now claiming that the record does not show

withholding of the document from petitioners; respondents' repeated failure to produce the document after demand therefor; respondents' material distortion of petitioners' issues and failure to discuss the following issues:

(i) a substantial number of inordinate new-car delivery delays by GM of the cars ordered by petitioners;

(ii) actual prejudice of the judge (respondents falsely claiming that petitioners did not raise such issue);

(iii) falsely claiming that petitioners and their counsel knew that GM was represented by the judge's firm when he was appointed to this action;

(iv) failing to deny or even discuss the fact that respondents and their counsel knew about the judge's relationship with GM at all times, and said nothing to plaintiffs or their attorney.

Conclusion

The Second Circuit's conclusion that Nabcor's business was based on an "unsound idea" (Resp. Br., p. 12) is a factual conclusion borrowed from a judge who should have disqualified himself from the very beginning of the case, and is a conclusion of fact not supported by the record. There is substantial evidence in the record, including GM's own documents and testimony by the GM President, that Nabcor's business was the first of its kind and was a serious threat to GM's dealers and would injure GM's own business (in competition with Nabcor in the distribution of new GM cars), and that Nabcor was put out of business by a conspiracy involving refusals to deliver ordered cars, refusals to deliver cars on time (involving inordinate delivery delays to Nabcor and, therefore, Nabcor's customers and brokers), and an artificial system of new-car shortages when Nabcor wanted cars while new cars were always

plentiful for customers approved by GM.

Petitioners should have the opportunity to develop by pre-trial proceedings and then trial, before a qualified judge, that petitioners' business was sound (but for the violations of law of which petitioners complained) and that respondents destroyed such business in violation of the antitrust laws (even if this Court decides that it will not review the presented issue of sufficiency of evidence).

The 8 years of litigation (mostly before a disqualified judge) known to be such by only respondents, their attorneys and the judge, is an intentional diversion and waste of the litigation time and money of petitioners and their attorney, with injurious effects upon the federal courts, which prevented petitioners from obtaining a fair trial and has made the judicial system up to this point somewhat suspect to petitioners and many others

watching this most important case.

Respondents and others should not be encouraged to repeat this performance in other cases by giving respondents and their counsel the unwarranted rewards of such litigation strategy. The federal court system will itself suffer to permit this type of litigation success, and encourage more of the same, including prolonged antitrust trials before former attorneys for the defendant (with little or no hope for the unknowing plaintiffs and their counsel).

For the foregoing reasons, and the reasons advanced in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 4, 1978